No. 83-2097

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In the Supreme Court of the United States

October Term, 1984

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

JOINT APPENDIX

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Appeal Docketed June 19, 1984
Jurisdiction Postponed October 1, 1984

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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

Case No.: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

v.

BRIAN MacSHARA, et al.,
Defendants.

(PART OF PLAINTIFF'S COMPOSITE EXHIBIT 21)

January 19, 1979

Messrs. John Rudzewicz and
Brian MacShara
345 Shotwell Court
Pontiac, MI 48054

Re: Burger King Location
Drayton Plains, Michigan

Gentlemen:

Pursuant to the requirements of Michigan's Franchise Investment Law, we are enclosing a copy of Burger King's Uniform Franchise Offering Circular together with two copies of a receipt, one of which is to be signed, dated, and returned to this office acknowledging that you received the disclosure information.

The signed receipt will become a part of the required documentation for your new Burger King location. We suggest that you carefully read the enclosed and, should you

have any questions regarding its contents, feel [illegible] to contact me at any time.

Very truly yours,

BURGER KING CORPORATION
Helen O. Donaldson, Director
Franchise Contracts Administration

HOD/pj
EIC

Enclosures

cc: H. G. Hoffmann, Jr.
A. Webb

FRANCHISE OFFERING CIRCULAR FOR PROSPECTIVE FRANCHISEES REQUIRED BY THE STATE OF MICHIGAN

Burger King Corporation
7360 N. Kendall Drive
P. O. Box 520783, General Mail Facility
Miami, Florida 33152
Phone: (305) 596-7011

The Burger King Corporation concept of franchise distribution is to offer good food at economical prices through quantity selling. A limited menu ensures uniform quality and speed of service suited for the lifestyle of today's consumer.

The initial franchise fee for the standard 20-year franchise is $40,000 which includes training and other services as herein described. The estimated initial investment, excluding real estate approximates $225,000. Estimated cost of land and building developed by the franchisee varies greatly but the majority run between $350,000 and $430,000. It should be noted that where the real property is developed by Company and leased to franchisee there shall be no rent abatement, diminution or reduction of rent for a period of one (1) year under any circumstances other than shall be taken in condemnation proceedings or by exercise of any right of eminent domain. THERE IS NO CONTRACTUAL PROVISION FOR FRANCHISE RENEWAL.

THIS OFFERING CIRCULAR IS PROVIDED FOR YOUR OWN PROTECTION AND CONTAINS A SUMMARY ONLY OF CERTAIN MATERIAL PROVISIONS OF THE FRANCHISE AGREEMENT. THIS OFFERING CIR-

CULAR AND ALL CONTRACTS OR AGREEMENTS SHOULD BE READ CAREFULLY IN THEIR ENTIRETY FOR AN UNDERSTANDING OF ALL RIGHTS AND OBLIGATIONS OF BOTH THE FRANCHISOR AND FRANCHISEE.

ALTHOUGH THESE FRANCHISES HAVE BEEN EXEMPTED FROM REGISTRATION UNDER THE MICHIGAN FRANCHISE INVESTMENT LAW, EXEMPTION DOES NOT CONSTITUTE APPROVAL, RECOMMENDATION OR ENDORSEMENT BY THE CORPORATION AND SECURITIES BUREAU OF THE STATE OF MICHIGAN OR A FINDING BY THE CORPORATION AND SECURITIES BUREAU OF THE STATE OF MICHIGAN THAT THE INFORMATION PROVIDED HEREIN IS TRUE, COMPLETE, ACCURATE OR NOT MISLEADING. A FALSE, INCOMPLETE, INACCURATE OR MISLEADING STATEMENT MAY CONSTITUTE A VIOLATION OF BOTH FEDERAL AND STATE LAW, AND SHOULD BE REPORTED TO BOTH THE FEDERAL TRADE COMMISSION, WASHINGTON, D. C. 20580 AND THE OFFICE OF THE CORPORATION AND SECURITIES BUREAU, P. O. BOX 30222, LANSING, MICHIGAN 48909.

THE MICHIGAN FRANCHISE INVESTMENT LAW MAKES IT UNLAWFUL TO OFFER OR SELL ANY FRANCHISE IN THIS STATE WHICH IS SUBJECT TO EXEMPTION FROM REGISTRATION WITHOUT FIRST PROVIDING TO THE PROSPECTIVE FRANCHISEE, AT LEAST 7 DAYS PRIOR TO THE EXECUTION BY THE PROSPECTIVE FRANCHISEE OF ANY BINDING FRANCHISE OR OTHER AGREEMENT, OR AT LEAST 7 DAYS PRIOR TO THE PAYMENT OF ANY CONSIDERATION BY THE FRANCHISEE, WHICHEVER OCCURS FIRST, A COPY OF THE OFFERING CIRCULAR TOGETHER

WITH A COPY OF ALL PROPOSED AGREEMENTS RELATING TO THE FRANCHISE.

Burger King Corporation's registered agent in the State of Michigan authorized to receive service of process is the Corporation Company, 64 Griswald Street, Detroit, Michigan.

The date of this Offering Circular is November 14, 1978

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FRANCHISE OFFERING CIRCULAR

1. *THE FRANCHISOR AND ANY PREDECESSORS:* Burger King Corporation is a Florida corporation located at 7360 N. Kendall Drive, Miami, Florida. It is the owner and operator of a chain of fast food restaurants and is a wholly-owned subsidiary of The Pillsbury Company, listed on the New York Stock Exchange with home offices in Minneapolis, Minnesota. Burger King Corporation has been in the business of franchising since 1954. It has since expanded to locations in 50 states, Puerto Rico, Germany, Bahamas, Canada, Australia, Spain, Sweden, England and

Denmark. As of May 31, 1978, there were 2,153 units in operation comprised of 436 company-owned units and 1,717 franchised units. Of the total number, 122 were located in the State of Michigan.

Burger King Corporation was originally founded in 1954 as Burger King of Miami, Inc., and incorporated as Florida Restaurants, Inc. in 1956. In 1963 the present name, Burger King Corporation, was adopted, and in June of 1967 it became a wholly-owned subsidiary of The Pillsbury Company. The Company does not now nor does it intend to do business under any name other than Burger King Corporation. Burger King Corporation is responsible for its franchise program and its several diversified divisions among which are Davmor Industries, which is engaged in the manufacturing of restaurant equipment, and Distron, its food processing and distribution division.

The management of Burger King Corporation believes the operation of its restaurants is a full-time business and franchises have never been issued for the operation of non-related businesses.

2. *IDENTITY AND BUSINESS EXPERIENCE OF PERSONS AFFILIATED WITH THE FRANCHISOR:* The business activities of Burger King Corporation are conducted by the officers and directors of the corporation all of whom may be contacted at P. O. Box 520783, General Mail Facility, Miami, Florida 33152. They are as follows:

Winston R. Wallin Chairman of Board of Directors	Stanley Kubu Vice President
Donald N. Smith President and Chief Executive Officer	William F. Murray Vice President

Donovan Christopherson Group Vice President	Richard D. Ungaro Vice President
E. Christian Schoenleb Group Vice President	Alden H. Bennett Vice President
Jerome B. Ruenheck Group Vice President	Carl T. Bergeman Vice President
Jerry G. Winter Vice President	Thomas F. Crummey Treasurer
Joseph M. Byrd Vice President	Jean Willis Secretary
Ramon J. Moral Vice President	William S. Spoor Director
Zane Leshner Vice President/General Counsel	Gordon M. Donhowe Director
C. James Lynch Vice President	Walter C. Scott Director
Ronald J. White Vice President	James W. McLamore Director
John A. Barnes Vice President	Philip D. Aines Director
Robert A. Carney Vice President	Norman Brinker Director
R. Victor H. Wood, Jr. Vice President	Donald N. Smith Director
Richard J. Roberts Vice President	Winston R. Wallin Director

Mr. Wallin was named Chairman of the Board of Burger King Corporation September 15, 1978. From June 1977 through September 1978, he presided as President and Chief Operating Officer of The Pillsbury Company, Minneapolis, Minnesota. In June of 1976, Mr. Wallin was named Executive Vice President having previously served as Vice President of Agri-Products division and Commodity Operations of The Pillsbury Company. Mr. Wallin has been affiliated with The Pillsbury Company since 1946.

Mr. Smith was named President and Chief Executive Officer of Burger King Corporation effective February 1, 1977. Prior thereto he held the position of Senior Executive Vice President and Chief Operations Officer of McDonald's Corporation, Chicago, Illinois, with whom he had been affiliated since 1966.

Mr. Christopherson was named Group Vice President, effective September, 1974. Prior thereto he was Vice President, Administration and Finance, and has been with Burger King Corporation since September, 1973. He was with The Pillsbury Company since July, 1958, last serving as Director, New Ventures/Products.

Mr. Schoenleb was named Group Vice President in January, 1976, having joined the company in April, 1972 as Vice President. Prior thereto he was Group Product Manager for the E. & J. Gallo Winery, Modesto, California.

Mr. Ruenheck was named Group Vice President in February, 1977. He joined the company in March, 1969 as a Management Trainee and has held the positions of District Manager and Division Manager until his promotion to Vice President in 1973.

Mr. Winter has been with Burger King Corporation since 1968 and was appointed Vice President in May, 1976. Prior

thereto he served as Franchise Representative, District Manager, Region Manager, and Division Manager, Restaurant Operations.

Mr. Byrd has been Vice President/Division Manager since November, 1974. He joined Burger King Corporation in October, 1967 and has held such positions as Supervisor, District Manager, and Region Manager.

Mr. Moral was named Vice President/Division Manager in June, 1977. He joined Burger King Corporation in 1962 and since that time has held the positions of Restaurant Manager, Area Supervisor, Franchise District Manager, Regicn Manager and Division Manager.

Mr. Leshner has been Vice President/General Counsel since January, 1976. He joined the company in April, 1972 as Corporate Counsel, and from November, 1974 until January, 1976 served as General Counsel. Prior thereto he was Staff Attorney for W. R. Grace and Company, Memphis, Tennessee, having been with them since 1968.

Mr. Lynch joined Burger King Corporation in October, 1977, as Vice President, International Division. Prior thereto he served as President of A & W International, Inc., Santa Monica, California. Prior to that he was associated with McDonald's Corporation, Chicago, Illinois, for several years.

Mr. White joined Burger King Corporation on November 1, 1977, as Vice President. Prior thereto and for the past twelve years he served as Vice President, Training, for McDonald's Corporation, Chicago, Illinois.

Mr. Barnes came to Burger King Corporation from The Pillsbury Company in 1972, serving as Technical Director, Food Products until 1974, at which time he joined the staff of McDonald's Corporation, Chicago, Illinois. In April of

1977, Mr. Barnes rejoined Burger King Corporation as Vice President, Menu Development.

Mr. Carney joined Burger King Corporation on April 24, 1978, as Vice President, Procurement. Prior thereto, and for the past fifteen years, he held various procurement staff positions with the Campbell Soup Company, Camden, New Jersey.

Mr. Wood joined Burger King Corporation in 1977 and holds the position of Vice President, Real Estate. Prior to that time he held the position of Director, International Real Estate, with McDonald's Corporation, Chicago, Illinois, with whom he had been affiliated since 1970.

Mr. Roberts joined Burger King Corporation in June, 1976 as Vice President/General Manager, Davmor, a division of Burger King Corporation. Prior thereto he had been Vice President and General Manager of Filter Dynamics, Edison, New Jersey; Director of Engineering for Cummins Engine Co., Cookeville, Tennessee; Engineering Manager for Tenneco Chemicals, Inc., Racine, Wisconsin; and Manager of Product Development for A. C. Spark Plug, Detroit, Michigan.

Mr. Kubu was appointed Vice President on July 1, 1974. He joined the company in May, 1968 as Director, Research and Development and has been Corporate Director, Quality Assurance since 1970.

Mr. Murray has been Vice President since February, 1973. He joined the company in August, 1969 as General Manager, Distribution and since November, 1971 had been Division Manager for Distron.

Mr. Ungaro was appointed Vice President in March, 1978, having joined the company in September 1972 as Project Engineer. Prior to 1972, Mr. Ungaro held positions with

the Kroger Company and Whitlock, Inc., both located in Detroit, Michigan.

Mr. Bennett has been with Burger King Corporation since 1968 and was recently appointed Vice President-Engineering. Prior thereto he served as assistant to the President of J. Russell Engineering, Boston, Massachusetts, through May, 1968.

Mr. Bergeman was appointed Vice President on October 1, 1977, after having served as Group Director, Information Systems, since January, 1976. Mr. Bergeman has been with Burger King Corporation since 1973.

Mr. Crummey was named Treasurer of Burger King Corporation in June, 1972, after having served as Assistant Treasurer from 1970 to 1972. From 1968 to 1970 he was a Financial Analyst with the company. Prior thereto he was with Wackenhut Corporation and Ernst & Ernst, Certified Public Accountants, both located in Miami, Florida.

Mrs. Willis was appointed Secretary in November, 1974. She joined Burger King Corporation in 1969 as secretary to the Assistant Secretary and Assistant General Counsel.

3. *LITIGATION*:

A. Burger King Corporation has no administrative or criminal proceeding or material civil actions pending, other than those listed herein, alleging a violation of any franchise law, fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations. There are currently pending the following civil actions involving Burger King Corporation as a party to the lawsuit alleging any of the above elements and

which, in the opinion of the Franchisor's several counsel, may be considered material:

Perington Wholesale, Inc. v. Burger King Corporation and Carpenter Paper Co.

Case No.: 74-1103

Court: U. S. District Court, District of Colorado

Date Filed: 11/26/74

This action arises from the termination by Burger King Corporation of plaintiff's status as an authorized distributor of certain products to Burger King franchisees. Plaintiff's complaint alleges that defendants violated Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, Section 1 of the Robinson-Patmon [sic] Act, Article 4 of the Colorado State Antitrust law, and Colorado common law, and seeks compensatory damages, treble damages, punitive damages and injunctive relief. Co-defendant, Carpenter Paper Co. has been dismissed. Burger King Corporation has filed an answer denying liability. During pre-trial conferences, claims for violation of state antitrust laws were stricken and the Robinson-Patmon [sic] claims were abandoned. On August 23, 1977, Burger King's Motion and [sic] dismiss was granted. Plaintiffs have appealed and briefs have been filed.

National Restaurants, Inc. v. Burger King Corporation, Gerald Mason, Wesley Hardy and Donald Szabo

Case No.: 74-CV-675-WI

Court: U. S. District Court, Western Division

Date Filed: 11/22/74

Plaintiff, a Burger King franchisee, alleged defendants violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Plaintiff also sought a declaration that certain of defendant's trademarks were invalid and sought injunctive relief enjoining defendant from any claim or charge of infringement by plaintiff. Damages are alleged to be $10 Million and, trebled, $30 Million. The case was settled and Burger King Corporation acquired the restaurant operated by plaintiff. The cost of settlement over and above the value of the restaurant was minimal.

Systems Control, Inc. v. Burger King Corporation, et al

Case No.: Civil Action No. 75-1878

Court: Supreme Court of State of New Jersey, Middlesex County, Chaucer Division

Date Filed: 9/30/75

This action was instituted to attempt to prevent termination of the plaintiff's ten Burger King restaurant franchises as a result of their violation of the provisions of their franchise agreements

relating to trade secrets and engaging in a business which is similar to a Burger King restaurant. Plaintiffs sought to have the restrictive covenant contained in the franchise agreements declared unlawful, and alleged that the company attempted to monopolize the self-service fast food business in New Jersey and sought to recover damages for alleged restraints of trade. The company denied the claims and filed a counterclaim seeking a judgment declaring that the franchise agreements had been breached, that the restrictive covenants were valid and enforceable, terminating the franchise agreements and enforcing the various lease agreements between the company and plaintiffs, enjoining plaintiffs from infringing upon the company trademarks and service marks, enjoining them from utilization of trade secrets and other confidential information disclosed by the company as a result of the franchise relationship. The case was settled when the ownership of plaintiff's corporation was sold. In the settlement, plaintiff agreed not to utilize Burger King Corporation's trade secrets and trade dress in any future business endeavor.

Harold Canada and Gladys Canada v. Burger King Corporation

Case No. IP 77-269-C

Court: U. S. District Court, Southern District of Indiana

Date Filed: 3/25/77

Plaintiffs alleged a breach by Burger King Corporation of an implied agreement to grant plain-

tiffs a franchise, contending they made various financial arrangements and commitments in reliance on the alleged grant. A Stipulation of Dismissal with prejudice was entered subsequent to settlement between the parties.

(Illegible)

Case No.: N78-143

Court: U.S. District Court, District of Connecticut

Date Filed: 5/30/78

Plaintiffs seek damages for alleged fraud and deceit, breach of contract and tortious interference with contract by defendants in the granting and operating of Burger King franchises in Fairfield and New Haven Counties. Answer and affirmative defenses have been filed on behalf of Burger King Corporation.

V.E.M. Corp., S.G.T. Corp., et al v. Burger King Corporation

Case No.: CV 178-32

Court: U.S. District Court, Southern District of Georgia

Date Filed: 2/17/78

Complaint alleges antitrust violations by monopolization and attempts to monopolize the hamburger fast food restaurant business in the southeastern U.S. by requiring plaintiff to purchase food and supplies from Burger King Corporation or designated sources; and alleged abandonment of trade-

mark. Answer and counterclaim have been filed and the action is in the discovery stage.

Melvin Holmes v. Burger King Corporation

Case No.: 78-1047

Court: Circuit Court of 11th Judicial Circuit of Florida

Date Filed: 1/25/78

Complaint seeks to recover compensatory and punitive damages because of alleged fraud in the sale of a franchised restaurant. Answer and counterclaim have been filed and discovery is continuing.

B. None of the Company's principal officers, directors or franchise brokers, during the ten-year period preceding the date of this offering circular, have been convicted of a felony or pleaded nolo contendere to a felony charge or been held liable in a civil action by final judgment or been the subject of a material complaint or other legal proceeding if such felony or civil action involved violation of any franchise law, fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations, to the best of our knowledge.

C. None of the Company's principal officers, directors or franchise brokers are subject to any currently effective injunctive or restrictive order or decree relating to the Franchise or under any federal, state or Canadian franchise, securities,

(illegible)

pending action or proceeding brought by a public agency, to the best of our knowledge.

4. *BANKRUPTCY:* To the best of our knowledge, none of Burger King Corporation's principal officers have, during the fifteen-year period immediately preceding the date of this offering circular, ever been adjudged bankrupt or required to reorganize due to insolvency; nor were any of them a principal officer of any company which was adjudged bankrupt or reorganized due to insolvency during or within one year after the period that such officer held such position.

5. *FRANCHISEE'S INITIAL FEE OR OTHER INITIAL PAYMENTS:*

The initial franchise fee for a standard twenty-year franchise is $40,000 and must be paid prior to the opening of the restaurant. Franchise fees are utilized to sustain and expand upon the services offered in the process of a franchise sale, including but not limited to the cost of franchise sales activities, training programs, restaurant opening support, legal expenses, accounting programs, and architecture and design expense. The franchise fee is fully earned upon execution of the agreement and is not refundable.

6. *OTHER FEES:* SUMMARY OF ESTIMATED COSTS

Franchise Fee	$ 40,000 (1)
Site Development Fee	5,000 (2)
Landscaping (Estimated)	18,500 (3)
Standard Sign Package (Estimated)	14,000 (4)
Standard Restaurant Equipment (Estimated), Including Installation	100,000
Freight/Sales Tax on Equipment (Estimated)	8,000 (5)
Working Capital for Prepaid Insurance*, Rent, Inventory, Permits, Utility Deposits, Supplies, Employee Training, Uniforms, etc.	21,500
Cash and Inventory Control Devices	18,000
TOTAL ESTIMATED COST	$225,000

(1) Plus a continuing monthly royalty of 3.5% of gross sales and a continuing monthly, advertising contribution of 4% of gross sales payable on the 10th of each calendar month. In addition, if the restaurant location is leased from Burger King Corporation, Franchisee shall pay a minimum rental of 13.4% of approximated capitalized site acquisition and construction costs, or 8.5% of monthly gross sales, whichever is greater.

(2) Real Estate and construction assistance.

(3) Landscaping for company-owned operations averages approximately $18,500.

(4) Includes foundation and steel, plus applicable sales or use tax. This figure reflects the average sign package cost for a drive-thru restaurant.

(5) F. O. B. Miami and 4% sales tax.

(6) *Insurance to include a Comprehensive General Liability Policy, including Products Liability, in the amount of $1,000,000 per occurrence for bodily injury and $500,000 property damage liability, or in such other amounts as Company may reasonably request, for the operation of the premises.

The Burger King Lease is a net lease and Franchisee is responsible for, among other things, tax assessments, repairs and alterations. Real Estate taxes will vary according to type of building and location.

7. *FRANCHISEE'S INITIAL INVESTMENT*: The summary of estimated costs in paragraph 6 above, reflects the estimated initial expenses a franchisee would incur in commencing operations, excluding personal expenses. A projected high-low dollar cost as to real estate is difficult to estimate due to the many variables which must be taken into consideration, e.g., geographic location, square footage, unusual building conditions, modifications and change orders, choice of interior decor, lot dimension, and other relevant factors peculiar to each acquisition. A rough estimate for land and building costs is $400,000.

The franchisee is not required to purchase any goods, supplies, equipment or fixtures from Company or any specified source, however, all equipment, fixtures, construction, leasehold improvements and interior decor must meet established standards and specifications. Should Franchisee elect to purchase restaurant equipment from Davmor, a division of Burger King Corporation, the current costs approxi-

mate $100,000 plus sales tax and freight. Local ordinances of a particular community may result in variances in types of required equipment which may affect the total price. Cash registration equipment approximates an additional $18,000. An average drive-thru sign package may be purchased at a cost of approximately $14,000, including foundation and steel. Burger King Corporation does not generally finance equipment, furnishings, or other fixed assets. Inventory, consisting of food, paper products, and working capital, including such items as prepaid insurance premiums, rent, permits, utility deposits, and supplies, would approximate $21,500.

THERE ARE NO OTHER DIRECT OR INDIRECT PAYMENTS IN CONJUNCTION WITH THE PURCHASE OF THE FRANCHISE.

8. *OBLIGATIONS OF FRANCHISEE TO PURCHASE OR LEASE FROM DESIGNATED SOURCES*: Burger King Corporation makes no requirement of its franchisees to purchase or lease services, supplies, products, fixtures, or other goods from it or any designated sources, however, all goods, services, supplies, fixtures, equipment and inventory relating to the establishment and/or operation of the franchised business must satisfy Company's specifications and criteria as to quality standards.

9. *OBLIGATIONS OF FRANCHISEE TO PURCHASE OR LEASE IN ACCORDANCE WITH SPECIFICATIONS OR FROM APPROVED SUPPLIERS*: Although Burger King Corporation does not obligate Franchisee to purchase or lease goods or services from Franchisor or designated sources, in order to uphold the high standards of its quality assurance program and to ensure compliance with product specifications and food safety, it does reserve the right to approve sources of the products utilized in its restaurant

operations. Any changes to or modifications of its standards are immediately communicated to franchisees.

Burger King Corporation, through its quality assurance program, conducts audits of approved suppliers encompassing product specification compliance, plant standards, and distribution facilities. If violations are not corrected or are repetitive in nature, approval is revoked. Alternate sources may be authorized provided that the product satisfies all Burger King Corporation specifications and criteria as to quality, appearance, size, taste, and processing.

Franchisor is one but not the only approved supplier of goods and services pertinent to the operation of a Burger King Restaurant, and franchisee is free to purchase from any approved supplier. Burger King Corporation is not privy to any contracts between franchisee and supplier nor does it receive any remuneration from approved sources.

10. *FINANCING ARRANGEMENTS*: Burger King Corporation does not generally offer direct financing to a standard franchisee, but upon request will assist qualifying individuals in obtaining the necessary financing if Franchisee is unable to arrange same through his own available sources. No payments are received for this assistance. There are circumstances, however, such as the sale of existing, multiple company units, where direct financing is available. There is, subject to availability of funds, limited financing to minorities through Burger King MESBIC, Inc., a wholly-owned subsidiary of Burger King Corporation, and licensed by the Small Business Administration. Burger King Corporation does not now, nor has it ever made a practice of selling, assigning or discounting to a third party any note, contract or other obligation of a franchisee, in whole or in part.

Prior to the opening of Franchisee's restaurant, Burger King Corporation will, upon request and agreement to pay a site development fee, assist Franchisee in site selection and will furnish him with multiple sets of standard building plans and specifications together with advice and consultation relative to their application. Intensive training programs are conducted at Franchisor's training centers throughout the country and Franchisee is required to attend and satisfactorily complete all courses. Franchisee receives guidance in the hiring and training of in-store personnel and overall opening supervision during his first days of operation. Advertising promotions are planned to introduce the new franchisee and his new Burger King Restaurant to the community. These services are capsulized in Article 5, page 3 of the current Franchise Agreement.

During the term of his restaurant operation, Franchisee will receive the benefits derived from Franchisor's research and development programs, as well as advertising and marketing research data. New techniques in food preparation and restaurant services are made available to franchisees as they are tested and approved.

Prior to and during the operation of his restaurant business, Burger King Corporation field personnel are available to assist the franchisee with any individual problems he may encounter. Franchisees desiring to remodel and update the image of their restaurant are offered total cooperation and encouragement within set guidelines. Information, layouts, and plans are either furnished or, depending upon complexity, made available to Franchisee at nominal cost.

Burger King Corporation assists in the selection of restaurant locations for franchisees acquiring their own property

and must approve all sites. The criteria applied when assisting franchisees in site selection is the same criteria utilized in the site selection of Company store operations. Demographic studies are made to determine traffic count and patterns and density of a particular market area; relevance of the site to potential competition as well as relevance of the site to existing Burger King operations are strongly considered; aerial photographs are utilized to survey the surrounding commercial activity. Additional studies and research may be done for exceptional locations where greater in-depth information must be taken into consideration before a final conclusion is reached as to site desirability.

Typically, a Franchisee receives his Franchise Agreement for execution approximately four weeks prior to opening. The documents are required to be signed and returned, together with the franchise fee at least one week before the restaurant is scheduled to open.

Burger King Corporation presently operates nine training centers throughout the country and each new franchisee is required to undertake and satisfactorily complete a course of training of approximately five weeks duration. Fifty hours of in-store training must be completed by Franchisee and/or his operating partner within six weeks of franchise approval.

(Illegible)
center nearest his home and normally scheduled during the time the restaurant is under construction. Here he receives instruction relative to equipment, cost and cash control, total food preparation, customer service, employee scheduling and methods of reducing operating costs. Both films and closed circuit television are utilized as training techniques. In-store training covers the management role

as well as training in each position to be filled by an hourly employee. Our training supervisors are recruited from top restaurant managers of Company operations and average three to four years previous experience with the Company. Tuition is included in the franchise fee, however, each franchisee is responsible for expenses incurred in traveling to and from the center and bears the cost of his own living expenses while attending the training program.

All new franchisees and/or operating partners are required to participate in the Company's training program. Additional training or refresher courses are available to existing franchisees at any time, although they are not required under the franchise agreement to avail themselves of these services.

12. *EXCLUSIVE AREA OR TERRITORY*: Generally, franchisees receive no exclusive area or territory. Burger King Corporation has extended area development agreements in order to expand heretofore undeveloped but potential market areas. Such agreements are granted for a specific term and usually contain a strict schedule expediting development of the area. Exclusivity normally precludes the establishment by Franchisor of company-owned or other franchisee outlets in the area.

13. *TRADEMARKS, SERVICE MARKS, TRADE NAMES, LOGOTYPES, AND COMMERCIAL SYMBOLS*: Burger King Corporation is the owner of certain service marks and trademarks which have been registered on the Principal Register of the United States Patent and Trademark Office. Company licenses to franchisee for the term of the franchise the right to use at the premises the name BURGER KING, together with such other insignia, symbols and trademarks which may be approved and authorized from time to time.

NAME	TYPE MARK	U.S. NO.	DATE
BURGER KING	Trademark	869,775	5/20/69
	Service Mark	722,375	10/3/61

These marks are not currently registered in the State of Michigan. There are presently no effective determinations of the Patent Office, the trademark administrator of the State of Michigan or any court, any pending interference, opposition or cancellation proceeding nor any pending material litigation involving trademarks, service marks, trade names, logo types or other commercial symbols which are relevant to their use in the State of Michigan.

Further, there are no agreements in effect in the State of Michigan which significantly limit the rights of the Franchisor to use or license the use of such trademarks, service marks, trade names, logotypes or the commercial symbols in any manner material to the franchise.

In the event of any threat or challenge to the validity of any proprietary rights, trademarks, trade names or service marks, franchisee is obligated to notify Burger King Corporation who has the sole discretion to take such action as it deems advisable.

There are no infringing uses actually known to Franchisor which could materially affect franchisee's use of such trademarks in the State of Michigan.

14. *PATENTS AND COPYRIGHTS*: Franchisor owns no patents which are licensed to the franchisee. Burger King Corporation does have proprietary rights in certain manuals and other materials which are made available to the franchisee. These manuals and other materials contain trade secrets and are loaned to franchisee for the exclusive purpose of using them in connection with the

Burger King Franchise. The Franchise Agreement grants him the right to use the material for the term of the franchise. Franchisee contractually agrees not to divulge any trade secrets or reproduce or exhibit any portion of the manuals or other materials to any person other than its employees.

In the event of any challenge to the validity of any trademarks, trade names, patents or copyrights, franchisee is obligated to notify franchisor who has the sole discretion to take such action as it deems advisable.

15. *OBLIGATION OF THE FRANCHISEE TO PARTICIPATE IN THE ACTUAL OPERATION OF THE FRANCHISE BUSINESS*: Burger King Corporation's concept of franchising is based upon a strong personal identification between the individual applicant and the management and ownership of the franchised unit. Burger King Corporation does not believe in absentee ownership of franchised restaurants and for this reason applicants for franchises must meet rigid established qualifications and at least one of the named franchisees must personally participate in the direct operation of the franchised business and retain a minimum of 50% owner's equity in the business.

16. *RESTRICTIONS ON GOODS AND SERVICES OFFERED BY FRANCHISEE*: Uniformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor. Franchisee, therefore, agrees to serve only those menu items specified by Burger King Corporation which meet its specifications and agrees to comply with the high standards of service and cleanliness as provided and set forth for each franchisee in the Burger King Manual of Op-

erating Data. The Franchise Agreement provides that the Restaurant will be open for business to the public a minimum 11:00 A.M. to 11:00 P.M., seven days a week unless otherwise authorized, however these hours are flexible and may, with Company consent, be modified so as to be of greatest benefit to Franchisee. All restaurants are required to be open a minimum of twelve hours daily.

17. *RENEWAL, TERMINATION, REPURCHASE, MODIFICATION AND ASSIGNMENT OF THE FRANCHISE AGREEMENT AND RELATED INFORMATION:* The current franchise is for a term of 20 years, and contains no provision for renewal. Franchisees who have complied with the provisions of the franchise and who have throughout the franchise term met the operational standards of Burger King Corporation will be given favorable consideration for a new franchise at the expiration of the agreement subject to and consistent with the Company's franchising practices at that time. Specific acts by the Franchisee which would be considered a default are delineated in Article 16, pages 9 and 10 of the Franchise Agreement. Such acts of default which are not timely cured or remedied could result in termination of the franchise. Repeated violations of a material nature could constitute good cause for termination or nonrenewal. No right of termination is granted to the franchisee once the Franchise Agreement has been executed.

If Franchisee is leasing the premises from Burger King Corporation, upon termination Franchisee retains liability for payment of base rent through the expiration of his lease term. Upon termination or expiration of a franchise agreement, Franchisee retains no right to the service marks or trademarks nor does he retain any right to their continued use in any similar business enterprise or identify itself in any manner as a current or former Franchisee

of Burger King Corporation. Upon termination or expiration, Franchisee shall be required to make such physical changes to the site as to effectively distinguish it from other Burger King Restaurants. Burger King Corporation may purchase Franchisee's paper goods, containers, printed menus and any and all materials bearing Burger King Corporation's trade names or trademarks. If the premises are leased from Company then, in the event of default, Company may offer to purchase his restaurant equipment, furniture, and signs at fair market value. Upon expiration of the franchise agreement, Franchisee retains no equity interest in the Burger King system. The franchise agreement constitutes the entire agreement of the parties and any modifications thereto may only be effected by mutual agreement in written form.

Burger King Corporation holds no right to unilaterally repurchase a franchise from an existing franchisee. In the event Franchisee desires to sell his restaurant, Burger King Corporation does have right of first refusal upon the same terms and conditions as tendered by the prospective purchaser. Further, Burger King Corporation at all times retains the right of approval of any prospective purchaser, including an existing franchisee, prior to the consummation of a sale. In the event of the death of a franchisee, Burger King Corporation shall consent to the transfer of interest to Franchisee's spouse, heirs or relatives, if, at the sole discretion and judgment of Company, such persons obtaining said interest shall be capable of conducting the business in a manner satisfactory to Company. The assignment, transfer or encumbrance of the Franchise Agreement without consent of Company shall constitute a material breach of the Agreement.

Burger King Corporation's present Franchise Agreement contains no provisions for the sale or assignment of Fran-

chisor's interest in the Company. Burger King Corporation's present franchise agreement contains a provision wherein Franchisee agrees that during the term of the agreement he shall not engage in any restaurant or prepared food business which is the same or similar to Company's business; nor will he engage in such business within a two-mile area for a period of twelve months after termination without the written consent of Company. Covenants not to compete upon termination or expiration of the franchise are generally unenforceable in the State of Michigan.

18. *ARRANGEMENTS WITH PUBLIC FIGURES*: The Company has no contractual commitment with public figures for the use of their names, and in those instances where athletic stars or show business personalities appear in spot advertisements or promotions for Burger King restaurants, the details of their appearances and their compensation will have been negotiated by the Company's advertising agency or the Company itself. Such promotions are usually in connection with grand openings or national advertising, and to the extent that it involves a franchised store, the franchisee may be responsible for the cost and contract details. Public figures contracted for promotional appearances are not involved in the Restaurant management nor have they any investment interest in the franchised operation itself.

19. *ACTUAL, AVERAGE, PROJECTED OR FORECASTED FRANCHISE SALES, PROFITS, OR EARNINGS*: Franchisor does not disclose to prospective franchisees the actual, average or projected sales, profits, or earnings of existing franchised units. A prospective franchisee will be furnished with a financial information package which includes representative cost factors based on a sampling of 100 company operated restaurants, and pro-

vides a basis upon which the applicant may compute his own pro forma cash flow chart. Franchisee is urged to consult with his personal accountant, attorney and, where possible, existing Burger King franchisees. A copy of the financial information package is attached hereto.

20. *INFORMATION REGARDING FRANCHISES OF THE FRANCHISOR*: One thousand seven hundred seventeen franchised Burger King restaurants were in operation as of May 31, 1978, its most recent fiscal year end, of which 60 were in the State of Michigan. One thousand seven hundred forty-four franchised restaurants were in operation as of the date of the preparation of this offering circular, 63 of which were in the State of Michigan. The Franchise Agreement must be executed no later than seven days prior to store opening. There are approximately 31 Burger King franchised restaurants scheduled to open in the near future for which agreements have been executed; 1 is in the State of Michigan.

Attached is a list of the names, addresses and telephone numbers of all franchise businesses located in the State of Michigan and operating under franchise agreements with Franchisor.

It is estimated that during Burger King's current fiscal year, which commenced June 1, 1978, 270 additional franchise units are projected, 11 of which are planned for the State of Michigan.

Burger King Corporation's history of franchise and company store sales, acquisitions and terminations during the preceding three year period is as follows:

(1) None have been cancelled for failure to comply with quality control standards. Thirty-four were terminated for other reasons.

(2) There have been no franchises which have reached maturity that Franchisor has refused to renew.

(3) Seventeen franchised units were reacquired through purchase by Franchisor and seventy-nine Company units were sold to franchisees.

21. *FINANCIAL STATEMENTS*: Attached hereto is a copy of Burger King Corporation's fiscal '78 financial statement and a copy of The Pillsbury Company Annual Report.

22. *CONTRACTS*: Attached hereto are representative copies of a current Franchise Agreement, Sublease Agreement, and Preliminary Agreements.

An acknowledgement receipt is attached hereto and made a part hereof. It is to be detached by Franchisee, signed, dated, and returned to Burger King Corporation.

• • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(PLAINTIFF'S EXHIBIT 3)

PRELIMINARY AGREEMENT

THIS AGREEMENT is made and entered into at Miami, Dade County, Florida, as of the 14th day of February, 1979, by and between BURGER KING CORPORATION, a Florida corporation ("BKC"), and John Rudzewicz and Brian MacShara ("FRANCHISEE").

INTRODUCTION

A. BKC has developed a restaurant format and operating system (the Burger King System) and is engaged in the business of operating and granting franchises to operate Burger King Restaurants using the Burger King System and the marks BURGER KING and WHOPPER and such other marks as may be authorized for use from time to time in the operation of Burger King Restaurants.

B. FRANCHISEE, desiring a franchise to operate a Burger King Restaurant, has made application to BKC.

C. FRANCHISEE was notified by a letter dated January 15, 1979, a copy of which is attached hereto as Exhibit "A", that his application for a franchise has been conditionally approved.

In consideration of the mutual covenants in this Agreement, the parties agree as follows:

1. FRANCHISEE agrees to cooperate with and, upon request, assist BKC in obtaining a suitable location within the designated area for the establishment of FRANCHISEE's Franchised Restaurant.

2. FRANCHISEE acknowledges his understanding that the franchise approval shall terminate if:

(a) Within twelve (12) months from January 12, 1979, a mutually acceptable site has not been acquired and construction commenced in accordance with plans approved by BKC, or

(b) BKC notifies FRANCHISEE that it has decided not to develop a site in designated area. If this should occur, FRANCHISEE may re-apply for a franchise in another available area, or

(c) FRANCHISEE fails to continue to meet BKC's financial requirements for a franchise, or

(d) FRANCHISEE fails to comply with the provisions of this Agreement, or

(e) BKC discovers that FRANCHISEE has made an untrue or misleading statement in his franchise application.

This Agreement shall be of no further force or effect upon termination of franchise approval or the date the Franchised Restaurant opens for business. BKC shall have no liability to FRANCHISEE if it for any reason fails to develop a site for the operation by FRANCHISEE of a Burger King Restaurant.

3. FRANCHISEE agrees to sign and return to BKC, within fifteen (15) days after receipt, a Franchise Agreement and Lease/Sublease, if applicable, in the then current form together with the franchise and site development fees. FRANCHISEE agrees that the Franchised Restaurant shall not be opened prior to the execution of a Franchise Agreement and Lease/Sublease and payment of the franchise and site development fees, and any other obligations owed by FRANCHISEE to BKC.

FRANCHISEE acknowledges that he has had an opportunity to review the Franchise Agreement currently being issued to new franchisees and will not do any act or cause to be done anything inconsistent with the provisions of said Franchise Agreement.

4. As a condition precedent to the Franchised Restaurant opening, FRANCHISEE and a designated manager must successfully complete BKC's training program at locations specified by BKC. The training shall include approximately three hundred (300) hours in-store structured training and approximately three (3) weeks instructional training at a Whopper College Regional Training Center and such other training facility as may be established by BKC. There shall be no charge for participation in the training program; however, FRANCHISEE shall be responsible for all travel and living expenses, compensation of and worker's compensation for himself and any manager while enrolled in the training program and any other personal expenses associated with such training.

5. The building for the Franchised Restaurant shall be constructed in a manner authorized and approved by BKC. All signs, equipment and furnishings used in the Franchised Restaurant shall meet BKC's specifications, criteria and performance standards.

6. Franchise approval was granted based upon the qualifications of FRANCHISEE and, therefore, this Agreement or any right or interest herein cannot be sold, assigned or transferred by FRANCHISEE.

7. FRANCHISEE agrees to pay to BKC a site development fee in the amount of Five Thousand Dollars ($5,000) for real estate services to be performed by BKC in selecting and negotiating for the acquisition of the site for FRANCHISEE's Franchised Restaurant, for assistance

in arranging for the construction of the restaurant building, and for monitoring through periodic inspections the construction of the restaurant building. BKC, by providing these services, does not guarantee or warrant the success of the Franchised Restaurant or the quality of construction. FRANCHISEE agrees to look to the contractor, and not BKC, for repairs or replacements which may be needed or for damages sustained because of any defects in workmanship or materials.

THIS AGREEMENT is executed by the parties effective as of the day and year indicated on the first page.

BURGER KING CORPORATION
By: /s/ (Illegible)
Executive Vice President
Attest: /s/ Helen O. Donaldson
Assistant Secretary

/s/ John J. Rudzewicz
John Rudzewicz

/s/ Brian MacShara
Brian MacShara

.....
FRANCHISEE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(PLAINTIFF'S EXHIBIT 8)

FRANCHISE AGREEMENT

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BURGER KING RESTAURANT FRANCHISE AGREEMENT

THIS AGREEMENT is made and entered into at Miami, Dade County, Florida, as of the 4 day of June, 1979, by and between BURGER KING CORPORATION, a Florida corporation ("BKC") and JOHN RUDZEWICZ and BRIAN MacSHARA ("FRANCHISEE").

INTRODUCTION

A. BKC is the owner of certain trademarks and service marks including BURGER KING which has been registered with the United States Patent and Trademark Office.

B. BKC has developed a restaurant format and operating system, including a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered, and procedures for inventory and management control (the Burger King System) and is engaged in the business of operating and granting franchises to operate Burger King Restaurants using the Burger King System and the marks BURGER KING and WHOPPER and such other marks as may be authorized from time to time for use in connection with Burger King Restaurants (the Burger King Marks).

C. BKC has established a high reputation and a positive image with the public as to the quality of products and services available at Burger King Restaurants, which reputation and image have been and continue to be unique benefits to BKC and its Franchisees.

D. FRANCHISEE recognizes the benefits to be derived from being identified with and licensed by BKC, and being able to utilize the Burger King System and the

Burger King Marks which BKC makes available to its franchisees.

E. FRANCHISEE desires to be franchised to operate a Burger King Restaurant at a specified location, and FRANCHISEE acknowledges that he has had a full and adequate opportunity to be thoroughly advised of the terms and conditions of this Agreement by counsel of his own choosing at least seven (7) days prior to its execution, and is entering into this Agreement after having made an independent investigation of BKC's operations and not upon any representation as to the profits and/or sales volume which FRANCHISEE might be expected to realize, nor upon any representations or promises by BKC which are not contained in this Agreement.

F. While FRANCHISEE has no contractual right, or BKC any obligation, to renew this franchise or enter into a successor franchise, BKC's business practice is structured to encourage succession and anticipates that a very high percentage of franchisees will seek and qualify for a successor franchise. Commitment to high standards, adaptation to a constantly changing competitive environment, sound financing, progressive merchandising, innovation, contribution of ideas and active participation in the system and community are the characteristics of a desired franchise operator. The franchisee not able to satisfy BKC successor standards will so be advised approximately four (4) years prior to the expiration of the term (or upon the occurrence of a disqualifying act during the last four (4) years). This advance notice period will afford the franchisee ample time and opportunity to recoup the full value of the franchised business through sale to a qualified successor. In addition to the balance of the original term, a full twenty (20) year franchise (assuming land availability) will be offered by BKC in

support of the sale, subject to the then standard qualifying conditions requested of all franchisees (or new applicants when appropriate) qualifying for succession. The value of the Burger King System is enhanced by constant commitment to upgrading the quality of the individual franchisee and franchised restaurant business.

G. This Agreement, together with the Franchise Application and Management Commitment Form submitted by FRANCHISEE to BKC upon which BKC is relying in granting this franchise, constitute the entire agreement of the parties and supersedes all prior negotiations, commitments, representations and undertakings of the parties with respect to the subject matter of this Agreement.

In consideration of the mutual covenants contained in this Agreement, the parties agree as follows:

1. FRANCHISE GRANT: TERM

BKC grants to FRANCHISEE a license for a period of twenty (20) years to use the Burger King System and the Burger King Marks in the operation of a Burger King Restaurant (Franchised Restaurant) at 4983 Dixie Highway, Drayton Plains, Michigan. The term of this Agreement shall commence on the date the Franchised Restaurant opens for business and shall expire twenty (20) years thereafter unless sooner terminated in accordance with the provisions of this Agreement. FRANCHISEE accepts this license with the full and complete understanding that the license is for twenty (20) years with no promise or assurance of renewal or the granting of a new license at expiration. This license is for the described location only and does not in any way grant or imply any area, market or territorial rights proprietary to FRANCHISEE.

2. FRANCHISE FEE

FRANCHISEE acknowledges that the grant of this franchise constitutes the consideration for the payment by FRANCHISEE to BKC of Forty Thousand Dollars ($40,000), and that this sum shall be fully earned by BKC upon the execution and delivery of this Agreement.

3. FRANCHISEE REPRESENTATIONS

FRANCHISEE acknowledges his/their understanding of BKC's franchising policy of requiring all individuals who have any interest in the Franchised Restaurant, whether directly, beneficially or contingently, to be named in and be a party to the Franchise Agreement. If FRANCHISEE consists of more than one individual, the group must include an operating partner who, throughout the term of the Agreement, lives in the locality of the Franchised Restaurant. The operating partner must have a minimum 50% equity ownership (including profits) and a minimum 50% controlling interest through any voting apparatus in the Franchised Restaurant and must devote his full time and best efforts to the day-to-day operation of the Franchised Restaurant with no operational or management commitments in other businesses (except other Burger King Restaurants operated under franchises granted by BKC). FRANCHISEE agrees to furnish BKC with such evidence as BKC may request from time to time for the purpose of assuring BKC that FRANCHISEE's interest remains as represented in this Agreement.

4. STANDARDS AND UNIFORMITY OF OPERATION

The Burger King System is a comprehensive restaurant format and operating system for the sale of uniform and quality food products, emphasizing prompt and courteous service in a pleasant atmosphere. The establishment and

maintenance of a close personal relationship between BKC and FRANCHISEE in the operation of the Franchised Restaurant and adherence to the principles of the Burger King System constitute the basic underlying substance of this license.

Suggestions from franchisees for improving products, equipment, uniforms, restaurant facilities, service format and advertising are encouraged and will be considered by BKC when adopting or modifying standards, specifications and procedures for the Burger King System.

FRANCHISEE acknowledges and agrees that adherence to BKC's restaurant design and color schemes, signage, interior decor and equipment systems requirements, menu and service format and the provisions of the Manual of Operating Data (MOD Manual) are reasonable, necessary and essential to the image and success of each Burger King Restaurant and the Burger King Restaurant System. The MOD Manual contains the official mandatory restaurant operating standards, specifications and procedures prescribed from time to time by BKC for the operation of a Burger King Restaurant. The MOD Manual shall be kept at the Franchised Restaurant at all times and all changes or additions shall be inserted upon receipt. FRANCHISEE agrees that changes in the standards, specifications and procedures may become necessary and desirable from time to time and agrees to accept and comply with such modifications, revisions and additions to the MOD Manual which BKC in the good faith exercise of its judgment believes to be desirable and reasonably necessary. The confidential and proprietary material and information of BKC set forth in the MOD Manual is to be used by FRANCHISEE only in connection with the operation of the Franchised Restaurant and other licensed Burger King Restaurants. The MOD Manual and other

specifications, standards and operating procedures communicated in writing to FRANCHISEE shall be deemed a part of this Agreement. FRANCHISEE agrees:

A. Building and Premises

The building will be constructed and the premises improved in the manner authorized and approved by BKC and the appearance of the building and the premises will not thereafter be altered except as may be approved in writing by BKC. Further, FRANCHISEE shall maintain the building and premises in good condition and make all improvements and alterations as may be determined by BKC to be reasonably necessary to reflect an acceptable Burger King Restaurant image. FRANCHISEE shall undertake and complete such repairs, improvements and alterations as may be requested by BKC within the reasonable time specified by BKC.

B. Signs

The Burger King Marks will be displayed only in the manner and at such locations as are authorized by BKC. FRANCHISEE agrees to maintain and display signs reflecting the current image of Burger King Restaurants and shall not place additional signs or posters on the premises without the prior written consent of BKC. FRANCHISEE shall discontinue the use of and destroy such signs as are declared obsolete by BKC.

C. Equipment

Only equipment that shall have been approved by BKC as meeting its criteria and performance standards shall be used in the Franchised Restaurant. The equipment shall be maintained in a condition that meets operational standards specified in the MOD Manual, and as equipment

becomes obsolete or inoperable, FRANCHISEE will replace such items with the types and kinds of equipment as are then being installed in new Burger King Restaurants at the time of replacement. If BKC determines that additional or substitute equipment is needed because of a change in menu items or methods of preparation and service, FRANCHISEE will install the new equipment within the reasonable time specified by BKC.

D. Vending Machines, Etc.

Telephone booths, newspaper racks, juke boxes, cigarette, gum and candy machines, games, rides or any other vending machines will not be installed on the premises without the prior written approval of BKC.

E. Menu and Service

All menu items which BKC may deem appropriate to take fullest advantage of the potential market and achieve standardization in the Burger King System will be served, and no items which are not set forth in the MOD Manual or otherwise authorized and approved by BKC in writing will be served. FRANCHISEE shall adhere to all specifications contained in the MOD Manual or as otherwise prescribed by BKC as to ingredients, methods of preparation and service, weight and dimensions of products served, and standards of cleanliness, health and sanitation. All food, drink and other items will be served and sold in packaging that meets BKC's specifications. Only food and supplies from approved sources shall be used in the Franchised Restaurant.

F. Hours of Operation

The entire Franchised Restaurant shall be open for business as a minimum 11:00 A.M. to 11:00 P.M., seven

(7) days a week, fifty-two (52) weeks a year unless otherwise authorized or directed by BKC. The Franchised Restaurant may be closed on Thanksgiving and/or Christmas if a majority of the Burger King Restaurant operators in the market area (A.D.I.) in which the Franchised Restaurant is located elect to close on the holiday.

G. Uniforms

All employees shall wear uniforms of such design and color as from time to time shall be prescribed by BKC.

H. Advertising and Promotional Materials

Only those advertising or promotional materials or items which are authorized by BKC in writing prior to use shall be used, sold or distributed, and no display or use of the Burger King Marks shall be made without the prior written permission of BKC. All materials on which the Burger King Marks are used must include the designation [R] or such other notice of registration or license legend as BKC may specify.

I. Right of Entry and Inspection

To ensure compliance with this Agreement, BKC shall have the unrestricted right to enter the Franchised Restaurant to conduct such activities as it deems necessary to ascertain compliance with this Agreement. The inspections may be conducted without prior notice at any time when FRANCHISEE or one of his employees is at the Franchised Retaurant. The inpections will be performed in a manner which minimizes interference with the operation of the Franchised Restaurant.

J. Interference With Employment Relations of Others

Franchisee will not attempt, directly or indirectly to entice or induce, or attempt to entice or induce any employee of BKC or of another franchisee of BKC to leave such employment nor to emplcy such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.

5. SERVICES AVAILABLE TO FRANCHISEE

BKC agrees to periodically advise and consult with FRANCHISEE in connection with the operation of the Franchised Restaurant and to provide to FRANCHISEE:

A. Standard plans and specifications for a free-standing building including furnishings, decor, layout and signs, together with advice and consultation. Any modifications for non-standard buildings, whether required by local zoning or building laws or otherwise, must be approved in writing by BKC and are to be paid for by FRANCHISEE.

B. A pre-opening training program conducted at BKC training facilities and Burger King Restaurants.

C. Pre-opening and opening supervision and assistance by personnel of BKC at FRANCHISEE's premises.

D. Opening promotion programs. FRANCHISEE's advertising and sales promotion payment for the first two full calendar months in which the Franchised Restaurant is open shall be available to implement grand opening promotions conducted within ninety (90) days after the Franchised Restaurant opens. Any additional costs incurred in implementing the programs shall be FRANCHISEE's responsibility.

E. BKC's confidential MOD Manual containing the standards, specifications, procedures and methods for operating a Burger King Restaurant, a copy of which will be loaned to FRANCHISEE for the term of this Agreement.

F. Such merchandising, marketing and advertising research data and advice as may be developed from time to time by BKC and deemed by it to be helpful in the operation of a Burger King Restaurant.

G. A standardized accounting, cost control and inventory control system.

H. Communication of new developments, techniques and improvements of BKC in food preparation, equipment, food products, packaging and restaurant management which are relevant to the operation of a Burger King Restaurant.

6. RESTAURANT SITE

The site at which FRANCHISEE shall operate the Franchised Restaurant is more fully described in Exhibit "A". During the term of this Agreement the site shall be used exclusively for the purpose of operating a franchised Burger King Restaurant.

In the event the building shall be damaged or destroyed by fire or other casualty, or be required to be repaired or reconstructed by any governmental authority, FRANCHISEE shall repair or reconstruct the building within a reasonable time under the circumstances. The minimum acceptable appearance for the restored building will be that which existed just prior to the casualty; however, every effort should be made to have the restored building reflect the then current image, design and specifications of Burger King Restaurants. If the building is

substantially destroyed by fire or other casualty, FRANCHISEE may, with BKC agreement, terminate this Agreement in lieu of FRANCHISEE reconstructing the building.

7. TRAINING

As a condition precedent to the Franchised Restaurant opening, FRANCHISEE and a designated restaurant manager must have successfully completed BKC's training program at locations specified by BKC. There shall be no charge for participation in the training program; however, FRANCHISEE shall be responsible for all travel and living expenses, compensation of and worker's compensation for himself and the manager while enrolled in the training program and any other personal expenses.

FRANCHISEE shall undertake and complete continuing training programs from time to time as may be directed by BKC in order to implement current operational standards.

FRANCHISEE shall implement a training program for Franchised Restaurant employees in accordance with training standards and procedures prescribed by BKC and shall staff the Franchised Restaurant at all times during the term of this Agreement with a sufficient number of trained employees including at least one (1) manager who has completed BKC's training program for restaurant managers at an accredited location to ensure that the Burger King operational standards are met. Requests for exemption from the manager training requirement will be considered on an individual basis and will be granted only in those situations where the employee has prior operational experience in a Burger King Restaurant and demonstrates to BKC a thorough knowledge and understanding of the Burger King System.

8. ROYALTIES AND ADVERTISING CONTRIBUTION

A. Royalties

FRANCHISEE agrees to pay to BKC a royalty of 3.5% of gross sales for the use of the Burger King System and the Burger King Marks. Royalties shall be paid monthly by the tenth (10th) day of each month based upon gross sales for the preceding month.

B. Advertising, Sales Promotion and Public Relations

In addition, FRANCHISEE shall pay to BKC an amount equal to 4% of FRANCHISEE's monthly gross sales by the tenth (10th) day of each month based upon FRANCHISEE's gross sales for the preceding calendar month. This sum, less direct administrative expenses, will be used for advertising, sales promotion and public relations both in the market area (A.D.I.) in which the Franchised Restaurant is located and on a national basis including creative, production, media and clearance costs of advertising and sales promotion materials and those market research expenditures directly related to the development and evaluation of the effectiveness of advertising and sales promotion. All such expenditures shall be at the discretion of BKC. The payments based upon sales during the first two (2) full calendar months of operation shall be allocated for approved grand opening promotions. Any portions of these sums not spent within six (6) months of the Franchised Restaurant opening shall then become a part of the A.D.I. market fund for the market area in which the Franchised Restaurant is located.

C. Gross Sales

The term "gross sales" as used in this Agreement includes all sums charged for goods, merchandise or services sold at or from the Franchised Restaurant, including all premiums unless exempted by BKC. The sale of Burger King products away from the Franchised Restaurant is not authorized; however, should any such sales be approved in the future, they will be included within the definition of gross sales. Gross sales excludes any federal, state, county or city tax, excise tax, or other similar taxes collected by FRANCHISEE from customers based upon sales, and cash received as payment in credit transactions where the extension of credit itself has already been included in the figure upon which the royalty and advertising contribution is computed.

D. Interest and Attorney's Fees

Any royalty and advertising and sales promotion contribution not paid when due shall bear interest at the maximum rate allowed by law. In any litigation to enforce the terms of this Agreement, the prevailing party shall be paid by the other party all costs, including attorney's fees, incurred as a result of the legal action.

9. ACCOUNTING PROCEDURES: RIGHT OF AUDIT

A. Accounting

FRANCHISEE agrees to keep complete records of his business and furnish BKC with a monthly and fiscal year to date profit and loss statement in the format prescribed by BKC. FRANCHISEE shall also submit to BKC quarterly balance sheets, the first of which shall be for the period ending three (3) months after the Franchised Restaurant opens. All profit and loss statements and balance sheets should be prepared in accordance with generally accepted accounting principles and shall be submitted to BKC within fifteen (15) days after the end

of the period covered by the report. In addition, FRANCHISEE shall submit to BKC copies of all state sales tax returns relating to sales at the Franchised Restaurant at the same time the returns are filed and such other records as BKC may reasonably request from time to time.

B. Annual Financial Statements

Within ninety (90) days after the close of each fiscal year, FRANCHISEE shall submit a full disclosure of all persons with any interest in the Franchised Restaurant and a complete annual financial statement, which statement, if requested by BKC, shall be certified by a Certified Public Accountant.

C. Audits

FRANCHISEE agrees that BKC or its representatives, at BKC's expense, shall, at all reasonable times, have the right to examine or audit the books or accounts of FRANCHISEE. FRANCHISEE shall retain sales records for a period of at least twenty-four (24) months. In the event a discrepancy is found between reported gross sales and actual gross sales which exceeds 5%, FRANCHISEE shall reimburse BKC for all costs of the audit including travel, lodging and wages.

D. Release of Financial Information

FRANCHISEE gives permission to BKC to release to FRANCHISEE's lenders or prospective landlord or lenders financial and operational information relating to FRANCHISEE and/or the Franchised Restaurant.

10. LIMITATIONS OF FRANCHISE

A. Trademarks, Trade Names, Service Marks and Trade Secrets

(1) FRANCHISEE acknowledges that ownership of all right, title and interest to the Burger King System, Burger King Marks, and the design, decor and image of Burger King Restaurants is and shall remain vested solely in BKC, and FRANCHISEE disclaims any right or interest therein or the good will derived therefrom. FRANCHISEE agrees that all materials loaned or otherwise made available to him and all disclosures made to him and not to the general public by or at the direction of BKC at any time before or during the term of this Agreement including, without limitation, the MOD Manual in its entirety, are to be considered trade secrets of BKC for purposes of this Agreement and shall be kept confidential and used by him only in the operation of the Franchised Restaurant and other licensed Burger King Restaurants. FRANCHISEE agrees that he shall not divulge any of the trade secrets to any person other than his employees and then only to the extent necessary for the operation of the Franchised Restaurant and will not, nor permit anyone to, reproduce, copy or exhibit any portion of the MOD Manual or any other confidential or proprietary information received from BKC.

(2) FRANCHISEE will not, directly or indirectly, at any time during the term of this Agreement or thereafter, do or cause to be done any act or thing disputing, attacking or in any way impairing or tending to impair BKC's right, title or interest in the Burger King Marks and the Burger King System. FRANCHISEE shall immediately notify BKC of all infringements or imitations of the Burger King Marks which come to his attention

or challenges to FRANCHISEE's use of any of the Burger King Marks, and BKC shall exercise absolute discretion in deciding what action, if any, should be taken. FRANCHISEE agrees to cooperate in the prosecution of any action to prevent the infringement, imitation, illegal use or misuse of the Burger King Marks and agrees to be named as a party in any such action if so requested by BKC. BKC agrees to bear the legal expenses incident to FRANCHISEE's participation in such action, except for the cost of FRANCHISEE's personal legal counsel if FRANCHISEE elects to be represented by counsel of his own choosing.

(3) In the adoption of a corporate or partnership name, FRANCHISEE shall not use any of the Burger King Marks, any variations or abbreviations, or any words confusingly similar to the Burger King Marks.

B. Independent Contractor

FRANCHISEE is an independent contractor and is not an agent, partner, joint venturer or employee of BKC, and no fiduciary relationship between the parties exists. FRANCHISEE shall have no right to bind or obligate BKC in any way nor shall he represent that he has any right to do so. BKC shall have no control over the terms and conditions of employment of FRANCHISEE's employees.

In all public records and in his relationship with other persons, on stationery, business forms and checks FRANCHISEE shall indicate his independent ownership of the Franchised Restaurant and that he is a franchisee of BKC. FRANCHISEE shall, if requested by BKC, exhibit on the premises in such places as may be designated by BKC, a notification that the Franchised Restaurant is operated by an independent operator and not by BKC.

11. UNFAIR COMPETITION

FRANCHISEE acknowledges the uniqueness of the Burger King System procedures, menu, strategies and materials, and that BKC is making its knowledge, know-how and expertise available to him only for the purposes of operating the Franchised Restaurant. FRANCHISEE agrees that it would be an unfair method of competition to use or duplicate any of the knowledge, know-how and expertise received from BKC for any use other than for the operation of franchised Burger King Restaurants. FRANCHISEE, therefore, warrants that during the term of this Agreement, he will utilize his best and continuing efforts to promote and develop the business at the Franchised Restaurant and during the term hereof and thereafter will not directly or indirectly engage in the operation of any restaurant, other than the Franchised Restaurant and other Burger King Restaurants licensed from BKC, which utilizes or duplicates the Burger King System or any part thereof.

12. INSURANCE: INDEMNIFICATION

A. FRANCHISEE agrees to carry at his expense during the term of this Agreement Comprehensive General Liability insurance, including Products Liability and Broad Form Contractual Liability, in an amount of not less than $1,000,000 per occurrence for bodily injury and $500,000 per occurrence for property damage, or in such other amounts as BKC may reasonably request. Each policy will name BKC and its subsidiaries as an additional insured, will provide that the policy cannot be cancelled without thirty (30) days prior written notice to BKC, and shall insure the contractual liability of FRANCHISEE under paragraph 12 C. Prior to the Franchised Restaurant opening, FRANCHISEE shall furnish to BKC a Certificate

of Insurance reflecting that the insurance coverage is in effect. All policies shall be renewed, and a renewal Certificate of Insurance mailed to BKC prior to expiration date.

B. FRANCHISEE agrees to secure and pay premiums on a Worker's Compensation policy covering himself and all his employees, as required by law.

C. FRANCHISEE is responsible for all losses or damages and contractual liabilities to third persons arising out of or in connection with possession, ownership or operation of the Franchised Restaurant, and for all claims or demands for damages to property or for injury, illness or death of persons directly or indirectly resulting therefrom; and FRANCHISEE agrees to defend, indemnify and save BKC and its subsidiaries harmless of, from and with respect to any such claims, demands, losses, obligations, costs, expenses, liabilities, debts or damages unless resulting from the negligence of BKC or defects in goods manufactured by BKC. BKC shall notify FRANCHISEE of any claims, and FRANCHISEE shall be given the opportunity to assume the defense of the matter. If FRANCHISEE fails to assume the defense, BKC may defend the action in the manner it deems appropriate, and FRANCHISEE shall pay to BKC all costs, including attorneys fees, incurred by BKC in effecting such defense, in addition to any sum which BKC may pay by reason of any settlement or judgment against BKC. BKC's right to indemnity under this Agreement shall arise notwithstanding that joint or concurrent liability may be imposed on BKC by statute, ordinance, regulation or other law.

13. TAXES

FRANCHISEE shall pay when due all taxes levied or assessed in connection with the possession, ownership

or operation of the Franchised Restaurant. In the event of any bona fide dispute as to the liability for a tax assessed against him, FRANCHISEE may contest the validity or the amount of the tax in accordance with procedures of the taxing authority; however, FRANCHISEE shall not permit a tax sale or seizure against the premises or equipment.

14. ASSIGNMENT: CONDITIONS AND LIMITATIONS

A. This Agreement and license are personal to FRANCHISEE, and FRANCHISEE shall not sell, assign or transfer this Agreement or any right or interest in the license granted, nor permit any such assignment or transfer to occur directly, indirectly or contingently by agreement or operation of law without the prior written consent of BKC. If FRANCHISEE consists of more than one (1) person, the requirement of BKC's prior approval shall apply to a transfer of all or part of one partner's interest to another partner. FRANCHISEE understands that this Agreement and the license granted may not be pledged, mortgaged, hypothecated, given as security for an obligation or in any manner encumbered. The assignment of any interest, except as provided in paragraphs 14 and 15, shall constitute a material breach of this Agreement.

B. In the event of the death of FRANCHISEE or, if this Agreement has been assigned to a corporation, the death of a stockholder, BKC shall consent to a transfer of decedent's interest to his heirs subject to the following conditions:

(1) The heir must complete and be approved through BKC's standard franchisee selection process including satisfactorily demonstating to BKC that he meets the financial, character, and managerial criteria, as well

as equity ownership and such other criteria and conditions as BKC shall then be applying in considering applications for new licenses.

(2) The heir shall agree, in writing, to assume liability for and to perform all the terms and conditions of this Agreement to the same extent as the original franchisee.

(3) If the heir is not approved, the deceased's estate shall use its best efforts to sell the Franchised Restaurant to an acceptable party within twelve (12) months from the date of FRANCHISEE's death, and BKC shall have an option, but not the obligation, to operate and/or manage the Franchised Restaurant for the account of FRANCHISEE's estate until the deceased FRANCHISEE's interest is transferred to another party acceptable to BKC. Should BKC elect to operate and/or manage the Franchised Restaurant, BKC shall make a complete accounting and shall forward the net income from the operation to FRANCHISEE's estate, less expenses and a reasonable management fee. If the conveyance of the Franchised Restaurant to a party acceptable to BKC has not taken place within the twelve (12) month period, BKC shall have the option to purchase the Franchised Restaurant at fair market value.

C. With the prior written consent of BKC, FRANCHISEE may assign this Agreement to a corporation in which he shall own 100% of the issued stock. BKC may impose reasonable conditions on such assignment, including without limitation:

(1) The assignment to a corporation will not relieve FRANCHISEE of personal liability to BKC for performance of all obligations under this Franchise Agreement.

(2) Any subsequent transfer or issuance of shares of the assignee corporation shall be subject to BKC's approval. In the case of an acquisition of additional shares by the operating partner, this requirement shall be satisfied by BKC being given written notice describing the transaction within seven (7) days following the transfer. At no time shall the assignee corporation have more than five (5) shareholders unless otherwise authorized in writing by the Chief Executive Officer of BKC.

(3) The assignee corporation shall not engage in any business activity other than that which is directly related to the operation of franchised Burger King Restaurants.

(4) FRANCHISEE (operating partner if FRANCHISEE consists of more than one (1) person) must remain the owner of not less than 50% of the outstanding stock after any transfer or issuance of shares of assignee corporation.

(5) The Articles of Incorporation and By-Laws of the corporation shall reflect the limitation in the number of shareholders and that the issuance and transfer of shares of stock are restricted and may be transferred only in accordance with the terms and conditions of this Agreement.

(6) All stock certificates shall include the following legend:

> The transfer of this stock is subject to the terms and conditions of a Franchise Agreement with Burger King Corporation. Reference is made to such Franchise Agreement and the restrictive provisions of the Charter and By-laws of this corporation.

15. RIGHT OF FIRST REFUSAL

A. In the event FRANCHISEE receives an acceptable bona fide offer from a third party to purchase the Franchised Restaurant, he shall give BKC written notice setting forth the name and address of the prospective purchaser, the price and terms of the offer together with a franchisee application completed by the prospective purchaser, a copy of the sales contract and such other information that BKC may request in order to evaluate the offer. BKC shall then have the prior option to purchase FRANCHISEE's interest covered by such offer at the price and upon the terms of such offer. In addition, FRANCHISEE agrees that, prior to acquiring any other Burger King Restaurant franchise which may be offered to him for sale or which he may offer to purchase, such franchise will first be offered to BKC on the same terms, conditions and price. If the consideration is not money, the purchase price shall be cash equal to the fair market value of the consideration. BKC shall have twenty (20) working days (excluding weekends and holidays) after receipt of FRANCHISEE's notice of offer and the furnishing of all requested information within which to notify FRANCHISEE of its intent to accept or reject the offer. Silence on the part of BKC shall constitute rejection. If the proposed sale includes assets of FRANCHISEE not related to the operation of franchised Burger King Restaurants, BKC may purchase only the assets related to the operation of franchised Burger King Restaurants or may also purchase the other assets, and an equitable purchase price shall be allocated to each asset included in the proposed sale. This right of first refusal shall apply to any transfer, conveyance, assignment, consolidation, merger or any other transaction in which legal or beneficial ownership of the license granted by this Agreement is vested in other than FRANCHISEE.

B. The election by BKC not to exercise its right of first refusal as to any offer shall not affect its right of first refusal as to any subsequent offer.

C. Any sale or attempted sale effected without first giving BKC the right of first refusal described above shall be void and of no force and effect.

D. If BKC does not accept the offer to purchase the Franchised Restaurant, FRANCHISEE may conclude the sale to the purchaser who made the offer provided BKC's consent to the assignment be first obtained, which consent will not be unreasonably withheld upon compliance with the conditions imposed by BKC on the assignment. Conditions on assignment may include without limitation:

(1) All obligations of FRANCHISEE to BKC, whether arising under this Agreement or otherwise, must be satisfied at the time of transfer.

(2) Prospective purchaser must complete and be approved through BKC's standard franchisee selection process including satisfactorily demonstrating to BKC that he meets the financial, character, managerial, equity ownership and such other criteria and conditions as BKC shall then be applying in considering applications for new licenses.

(3) Approval by BKC of the terms and conditions in the contract of sale which affect the sufficiency of cash flow from the business after payment of debt service necessary for reinvestment in the business for refurnishing, maintaining and remodeling the premises.

(4) Prospective purchaser shall have satisfactorily completed BKC's training for new franchisees.

(5) FRANCHISEE seller shall remain personally liable to BKC for royalty and advertising payments; how-

ever, FRANCHISEE seller will be released from personal liability if the assignee remains current in all financial obligations to BKC throughout the period, including any extensions, in which the assignee is making any payments to FRANCHISEE seller under an obligation incurred in connection with the sale, or for a period of twenty-four (24) months, whichever is longer. The contract of sale must provide that installment payments of the purchase price shall be subordinate to royalty and advertising payments called for in this Agreement.

(6) BKC shall be paid an assignment fee of Two Thousand Dollars ($2,000) for the costs and expenses incurred by BKC in connection with the transfer.

(7) Execution by FRANCHISEE seller of a general release of BKC in a form satisfactory to BKC.

16. DEFAULT AND EFFECT OF TERMINATION

A. Default

If an act of default occurs and FRANCHISEE fails to cure the default within the cure period specified and if no time is specified then within thirty (30) days of notice of default, BKC may, at its option and without prejudice to any other rights or remedies provided for hereunder or by law terminate the license granted herein. If any applicable law or rule requires a greater prior notice of termination, the prior notice required by such law or rule shall be substituted for the notice requirements herein. The following shall be an act of default:

(1) FRANCHISEE fails to maintain and operate the Franchised Restaurant in accordance with the standards and specifications established by BKC as to service, cleanliness, health and sanitation, knowingly sells any

product which does not conform to BKC's specifications, fails to sell products designated by BKC, or sells products not approved by BKC. FRANCHISEE shall have five (5) days after notification to cure the default.

(2) FRANCHISEE fails to pay when due any royalty or advertising and sales promotion contribution required to be paid under this Agreement. FRANCHISEE shall have ten (10) days after notification to cure the delinquency.

(3) FRANCHISEE fails to submit any financial statement when required, or submits a financial statement which understates gross sales.

(4) FRANCHISEE voluntarily abandons the franchise relationship. The closing of the Franchised Restaurant other than with the consent of BKC shall be considered a voluntary abandonment of the franchise relationship. If this act of default shall occur, BKC shall have the right to immediately terminate the license.

(5) FRANCHISEE ceases to occupy the premises. If the loss of possession is the result of governmental exercise of eminent domain, FRANCHISEE may with BKC's consent and subject to availability relocate to other premises in the same market area for the balance of the term of this Agreement.

(6) FRANCHISEE (if Franchisee consists of more than one person, the operating partner or the partnership, and if the franchise has been assigned to an operating corporation, the corporation) files a petition or application seeking any type of relief under the Bankruptcy Act or any state insolvency or similar law, or someone files a petition or application seeking to have FRANCHISEE adjudicated a bankrupt, or seeking other relief against FRANCHISEE

under the Bankruptcy Act or any state insolvency or similar law and the petitioner application is not dismissed within ninety (90) days after it is filed. The Franchise shall terminate upon the occurrence of this act of default as if that date were the expiration date and FRANCHISEE expressly and knowingly waives any rights that he may have under the provisions of the Bankruptcy Rules and consents to the termination of this Agreement or any other relief which may be sought in a Complaint filed by BKC to lift the provisions of the automatic stay of the Bankruptcy Rules. Additionally, FRANCHISEE agrees not to seek an Injunctive Order from any court in any jurisdiction relating to insolvency, reorganization or arrangement proceedings which would have the effect of staying or enjoining this provision.

(7) FRANCHISEE admits in writing his inability to pay his debts as they mature or makes an assignment for the benefit of creditors, or a receiver (permanent or temporary) for any part of his property is appointed by a court of competent authority.

(8) A final judgment against FRANCHISEE remains unsatisfied of record for thirty (30) days (unless a supersedeas or other appeal bond has been filed) or if a levy of execution is made upon the license granted by this Agreement or upon any property used in the Franchised Restaurant, and it is not discharged within five (5) days of said levying.

(9) Conviction of FRANCHISEE in a court of competent jurisdiction of an indictable offense punishable by a term of imprisonment in excess of one (1) year directly related to the business conducted pursuant to this franchise.

(10) FRANCHISEE utilizes or duplicates the Burger King System in violation of paragraph 11 or discloses any portion of the MOD Manual in violation of paragraph 10A (1).

(11) FRANCHISEE denies BKC the right to inspect the Franchised Restaurant or to examine his books.

(12) Conduct by FRANCHISEE which is deleterious to or reflects unfavorably on FRANCHISEE or the Burger King Restaurant System.

(13) Failure by FRANCHISEE to maintain a responsible credit rating by failing to make prompt payment of undisputed bills, invoices and statements from suppliers of goods and services to the Franchised Restaurant.

(14) The assignment or transfer of any interest of FRANCHISEE in this license in violation of paragraphs 3, 14 and 15.

(15) Failure to restore the building after damage or destruction as provided in paragraph 6.

(16) The submission by FRANCHISEE of a franchise application and/or management commitment form which contains any false or misleading statements or omits any material fact necessary in order to make the statements made not misleading.

(17) Repeated breaches of provisions of this Agreement.

(18) The acquisition of an interest in a restaurant business in violation of paragraph 17.

(19) Failure by FRANCHISEE to comply with any other provisions of this Agreement.

The failure of BKC to terminate this Agreement upon the occurrence of one or more events of default will not constitute a waiver or otherwise affect the right of BKC

to terminate this license because of a continuing or subsequent failure to cure one or more of the aforesaid events of default or any other default.

B. Effect of Termination

(1) Upon termination or expiration of this Agreement, FRANCHISEE's right to use the Burger King Marks and the Burger King System shall terminate. FRANCHISEE shall not thereafter identify himself as a Burger King franchisee or publicly identify himself as a former Burger King franchisee or use any of BKC's trade secrets, operating procedures, promotional materials, Marks or any mark confusingly similar. Upon termination or expiration of this license, FRANCHISEE will immediately return to BKC the MOD Manual loaned to him, together with all other material containing trade secrets, restaurant operating instructions or business practices of BKC.

(2) FRANCHISEE grants to BKC, upon termination or expiration of this Agreement, the option to purchase all usable paper goods, containers and printed menus bearing BKC's trade names or Marks at FRANCHISEE's cost, and to purchase the restaurant equipment, furniture, fixtures and signs at fair market value.

(3) If the parties do not enter into a successor Franchise Agreement, FRANCHISEE agrees to immediately upon termination or expiration of this Agreement, make such removals or changes in signs and the building as BKC shall request, so as to effectively distinguish the premises from its former appearance and from any other Burger King Restaurant. In the event FRANCHISEE fails to make the changes, FRANCHISEE consents to BKC entering the premises to make non-structural changes at FRANCHISEE's expense.

(4) In the event of termination for any default of FRANCHISEE, any damage suffered by BKC shall be a lien in favor of BKC against the personal property, machinery, fixtures and equipment owned by FRANCHISEE on the premises at the time of such default.

17. RESTRICTIVE COVENANT

FRANCHISEE agrees that during the term of this Agreement he will not have any interest in any restaurant business which is the same or similar to Burger King Restaurants. For a period of one (1) year after termination or expiration of this Agreement, and within two (2) miles of the premises of the Franchised Restaurant, FRANCHISEE will not have any interest in any restaurant business the same as or similar to a Burger King Resturant.

18. MISCELLANEOUS: GENERAL CONDITIONS

A. Interpretation

The introduction shall be considered a part of this Agreement. Paragraph captions are used only for convenience and are in no way to be construed as part of this Agreement or as a limitation of the scope of the particular paragraphs to which they refer. Words of any gender used in this Agreement shall include any other gender, and words in the singular shall include the plural, where the context requires.

B. Non-Waiver

The failure of BKC to exercise any right or option given to it under this Agreement, or to insist upon strict compliance by FRANCHISEE with the terms of this Agreement, shall not constitute a waiver of any terms or conditions of this Agreement with respect to any other or

subsequent breach, nor a waiver by BKC of its right at any time thereafter to require exact and strict compliance with the terms of this Agreement. The rights or remedies set forth in this Agreement are in addition to any other rights or remedies which may be granted by law.

C. Governing Law

(1) This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this Agreement be filed in Florida.

(2) Anything in this Agreement to the contrary notwithstanding, FRANCHISEE shall conduct his business in a lawful manner and faithfully comply with applicable laws or regulations of the state, city or other political subdivision in which the Franchised Restaurant is located.

D. Severability

BKC and FRANCHISEE agree that if any provision of this Agreement may be construed in two ways, one of which would render the provision illegal or otherwise voidable or unenforceable and the other of which would render the provision valid and enforceable, such provision shall have the meaning which renders it valid and enforceable. The language of all provisions of this Agreement shall be construed according to its fair meaning and not strictly against BKC or FRANCHISEE. It is the desire and intent of BKC and FRANCHISEE that the provisions of this Agreement be enforced to the fullest extent, and should any provision be invalid or unenforceable under

Florida law, but valid under the laws of the state where the Franchised Restaurant is located, the provision shall be governed by the law of that state. In the event any court shall determine that any provision in this Agreement is not enforceable as written, BKC and FRANCHISEE agree that the provision shall be amended so that it is enforceable to the fullest extent permissable under the laws and public policies of the jurisdiction in which enforcement is sought. The provisions of this Agreement are severable and this Agreement shall be interpreted and enforced as if all completely invalid or unenforceable provisions were not contained in the Agreement, and partially valid and enforceable provisions shall be enforced to the extent that they are valid and enforceable.

E. Notices

(1) All notices to BKC shall be in writing and shall be delivered or sent by registered or certified mail, postage fully prepaid, addressed to it at its offices at P.O. Box 520783, General Mail Facility, Miami, Florida 33152, Attention: General Counsel, or at such other address as BKC shall from time to time designate in writing.

(2) All notices to FRANCHISEE shall be in writing and shall be hand delivered or sent by registered or certified mail or telegraph, addressed to FRANCHISEE at the Franchised Restaurant premises or FRANCHISEE's last designated in writing mailing address.

(3) Notices shall be deemed delivered on the earlier of actual receipt or the third (3rd) day after being deposited in the U.S. mail.

F. Liability of Multiple Franchisees

If FRANCHISEE consists of more than one person, each partner's liability under this Agreement shall be joint and several.

G. Modification

This Agreement may only be modified or amended by a written document.

H. Binding Effect

This Agreement shall be binding upon the parties, their heirs, executors, personal representatives, successors or assigns.

I. Survival

Any provisions of this Agreement which impose an obligation after termination or expiration of this Agreement shall survive the termination or expiration of this Agreement and be binding on the parties.

BURGER KING CORPORATION
By: /s/ (Illegible)
Executive Vice President
Attest: Helen O. Donaldson
Assistant Secretary
(Corporate Seal)

Witnesses:

/s/ Stevie A. Bide

/s/ (Illegible)

.....

/s/ John Rudzewicz
John Rudzewicz

/s/ Brian MacShara
Brian MacShara
FRANCHISEE

EXHIBIT "A"

4983 Dixie Highway
Drayton Plains, Michigan

LEGAL DESCRIPTION

Land in the Township of Waterford, County of Oakland and State of Michigan, described as:

Lots 11 and 12 of Supervisor's Plat No. 6 of part of the West 1/2 of the Southwest 1/4 of Section 3 and part of the East 1/2 of the Southeast 1/4 of Section 4, Town 3 North, Range 9 East, Waterford Township, Oakland County, Michigan, according to the plat thereof as recorded in Liber 47 of Plats, Page 26, Oakland County Records. Also described as beginning at the Southeast corner of Lot 11 and proceeding thence South 46 degrees 03 minutes 00 seconds West 250.00 feet; thence North 43 degrees 57 minutes 00 seconds West 174.24 feet; thence North 46 degrees 03 minutes 00 seconds East 250.00 feet; thence South 43 degrees 57 minutes 00 seconds East 174.24 feet to the point of beginning.

Subject to any and all reservations, restrictions, easements, rights of way, limitations and conditions of record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(PLAINTIFF'S EXHIBIT 9)

(Burger King Logo)

Lease/Sublease
Agreement

LEASE/SUBLEASE

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LEASE OR SUBLEASE AGREEMENT

THIS AGREEMENT (the "Lease"), is made this 4 day of June, 1979 (the "lease date"), by and between BURGER KING CORPORATION, a Florida corporation, 7360 North Kendall Drive, Miami, Florida ("Lessor"), and JOHN RUDZEWICZ and BRIAN MacSHARA ("Lessee"), whose address is 4983 Dixie Highway, Drayton Plains, Michigan 48020. (The terms "Lessor" and "Lessee" shall mean respectively "Sublessor" and "Sublessee" whenever the context requires or permits it.)

In consideration of the covenants contained in this Agreement, the parties agree as follows:

I.

PROPERTY LEASED

§1.1 DEMISE. Lessor leases to Lessee and Lessee leases from Lessor the following property (the "land") along with the Burger King Restaurant (the "building") and other improvements to be constructed on it (collectively called "the premises").

Legal Description: See Exhibit "A" attached hereto and made a part hereof.

Commonly described as: Burger King Restaurant
#775
4983 Dixie Highway
Drayton Plains, Michigan
48020

subject to conditions and restrictions of record, if any.

§1.2 ERECTION OF BUILDING. Commencement of this Lease is conditioned on the completion of the building in accordance with plans and specifications prepared by

Lessor's architect. Lessor has agreed to construct or contract for the construction of the building promptly and to complete or contract to complete it as promptly as conditions will permit, but in any event before one hundred eighty (180) days from the lease date; provided, however, that this period shall be extended by any time lost in construction due to delays caused by strike, lockout, acts of God, shortage of materials, or other conditions beyond the control of Lessor. In the event the building is not completed within one (1) year from the date of this Lease, this Lease may be terminated at the option of either party, on fifteen (15) days' notice to the other party.

§1.3 COVENANT OF QUIET ENJOYMENT. The Lessor promises, subject to Lessee's performance of all of the terms and conditions of the Lease, that Lessee shall be entitled to the quiet and peaceful enjoyment and undisturbed possession of the premises for the term of this Lease.

II.

TERM

§2.1 TERM. The term of this Lease (the "term") shall commence upon the earliest of the following dates (the "commencement date"):

(a) the date 10 days following date of the issuance of a Certificate of Occupancy for the premises by appropriate governmental authorities; or

(b) the date 10 days following date of certification by the architect that the land has been improved and the building constructed is substantially in conformance with the plans and specifications; or

(c) the date Lessee opens for business.

The term of this Lease shall expire at midnight on the day preceding the 20th anniversary of the commencement date (the "original term expiration date") unless sooner terminated as provided in this Lease. The commencement date shall be designated by the parties in a form capable of being recorded among the public records of the county where the premises are located.

§2.2 POSSESSION. Possession of the premises shall be delivered to the Lessee on the commencement date. Lessee shall have the right, however, prior to the beginning of the term to install furniture, restaurant equipment, trade fixtures and personal property ("personalty"), as well as equipment to be incorporated into the structure of the building at its own risk and free from rent, provided such installation does not interfere with the construction of the building. Lessee agrees that from the commencement date, it shall carry on business at the premises continuously during the term of this Lease, except in the event of loss of possession due to acts of God or other causes beyond the control of Lessee, in which event the terms of paragraph 5.8 shall control.

§2.3 HOLDOVER. Any holdover at the expiration of the term with the written consent of Lessor shall be on a month to month basis, which tenancy may be terminated by Lessor giving Lessee not less than fifteen (15) days notice. During such holdover tenancy, Lessee agrees to pay Lessor on a monthly basis all increased rentals and other charges that would have been due under this Lease and agrees to continue to be bound by all of the terms of this Lease which are applicable at that time. In the event Lessee holds over without consent of Lessor, the rent during any holdover period shall be double the average rent that was due during the last year of the Lease term.

§2.4 END OF TERM. At the expiration of this Lease, the fixtures located on the premises shall become the property of the Lessor. If, at that time, Lessee has fully complied with Lease terms and conditions, Lessor hereby waives any right to claim any personalty owned by Lessee located on the premises. The personalty may then be removed by Lessee provided that the premises are restored to their original condition, normal wear and tear excepted. With respect to any fixtures owned by Lessee prior to expiration of this Lease, Lessor shall pay to Lessee (or, if Lessee is indebted to Lessor, Lessor shall credit Lessee) an amount equal to the fair market value of such fixtures, not to exceed the amount originally paid by Lessee for such fixtures.

III.

CONSIDERATION

§3.1 RENT. Lessee agrees to pay Lessor as rent for each month of the term the following amounts ("the minimum monthly rent") or 8-1/2% of that month's gross sales, whichever amount is greater. The minimum amount of rent due annually (the "minimum annual rent") is computed at 12 times the minimum monthly rent.

Minimum Monthly Rent

Years 1 through 2:	$4,166.66		ZL
Years 3 ~~through 20:~~	~~$5,286.58~~	$4,416.66	BK JR BM
Years 4 through 20	$5,286.58		BK JR BM

(a) *Minimum Monthly Rent.* The minimum monthly rent shall be payable in advance on the first day of each month. If the commencement date of this Lease is not on the first day of a calendar month, the rent for the first month and last month shall be prorated.

(b) *Monthly Percentage Rent.* Monthly percentage rent is the excess, if any, of 8-1/2% of monthly gross sales over the minimum monthly rent. Monthly percentage rent for each month shall be due and payable by the 10th day of the following month.

(c) *Gross Sales.* The term "gross sales" as used in this Agreement includes all sums charged for goods, merchandise or services sold at or from the premises. The sale of Burger King products away from the premises is not authorized; however, should any such sales be approved in the future, they will be included within the definition of gross sales. Gross sales excludes any federal, state, county or city sales tax, excise tax, or other similar taxes collected by Lessee from customers based upon sales, and cash received as payment in credit transactions where the extension of credit itself has already been included in the figure upon which any previous monthly percentage rent has been computed.

(d) *Late Charges.* All rent shall be paid to Lessor without notice or demand and without abatement, deduction or set-off, except as otherwise expressly provided in this Lease. All rental payments delinquent for a period in excess of thirty (30) days shall be subject to late charges of 8% per annum.

§3.2 FINANCIAL REPORTS

(a) *Monthly Accounting.* Within ten (10) days after the end of each calendar month of the term, Lessee shall deliver to Lessor a statement in writing on a form approved by the Lessor, setting forth all of the gross sales for the preceding month.

(b) *Annual Accounting.* Within ninety (90) days after the end of each full year of this Lease, the Lessee

shall deliver to Lessor a statement showing the sales made at the premises during the preceding year, which, if requested by Lessor, shall be certified by a Certified Public Accountant.

(c) *Records and Audit.* Lessee agrees to keep full, true and accurate records and books of accounts of all transactions connected with its business. Lessor shall have the right to examine and inspect the books and records of Lessee at any reasonable time during normal business hours in order to verify the accuracy of statements rendered by the Lessee.

§3.3 ADDITIONAL CHARGES. Lessee and Lessor agree that the rent accruing under this Lease shall be net to Lessor and that all taxes, costs, common area maintenance fees, expenses and charges of every kind and nature ("additional charges") relating to the premises (except the taxes of Lessor referred to in §6.3 and any payments for interest or principal under any mortgage relating to the premises) which may arise or become due during the term or any extension of this Lease, shall be paid by Lessee, and that Lessee shall indemnify and save harmless Lessor from and against them. All additional charges which Lessee assumes or agrees to pay under any provisions of this Lease, together with all interest and penalties that may accrue on these additional charges in the event Lessee fails to pay them, as well as all other damages, costs and expenses, including, without limitation, reasonable attorneys' fees and other legal and court costs which Lessor may incur in enforcing this Lease, and any and all other sums which may become due by reason of Lessee's default or failure to comply with its obligations under this Lease, shall be deemed to be additional rent. In the event of non-payment, Lessor shall have all the rights and remedies as provided in the case of non-payment of rent.

IV.

INSURANCE

§4.1 COVERAGE. During the term, Lessee, at its own cost and expense, shall:

(a) Keep the premises and the fixtures and personalty on it insured with an all risk insurance policy in an amount sufficient to cover the cost of replacement (without deduction for depreciation). Such replacement cost shall be determined from time to time at the request of Lessor, but not more frequently than once in any thirty-six (36) consecutive calendar months. Replacement cost shall be determined by one of the insurers or, at the option of Lessor, by an appraiser, architect or contractor who is mutually and reasonably acceptable to Lessor and Lessee, and whom shall be retained and paid by Lessee.

(b) Provide and keep in force comprehensive general liability insurance against claims for personal injury, death or property damage occurring on, in or about the premises or the adjoining streets and property, in limits of not less than $1,000,000 per occurrence for bodily injury, not less than $500,000 per occurrence for property damage, or in such other amounts as Lessor may reasonably request.

(c) Provide and keep in force plate glass insurance covering the glass in the premises, unless waived by Lessor;

(d) If requested by Lessor, provide and keep in force rent insurance (and/or, as the case may require, use and occupancy insurance) in an amount not less than the minimum annual rent plus the estimated annual taxes, water charges, sewer rents and other assess-

ments and the annual premiums for the insurance required by this Article.

(e) If requested by Lessor or any mortgagee, provide and keep in force insurance for such other insurable hazards in such amounts as similarly situated premises are then commonly insured.

§4.2 POLICIES. All insurance required by Lessor and provided by Lessee shall be carried in favor of Lessor and Lessee, as their respective interests may appear, and any underlying lessor, fee owner, affiliate corporation, trustee, mortgagee or other person designated by Lessor. If requested by Lessor, insurance against fire or other casualty shall provide that the proceeds of any loss shall be payable to the mortgagee under a standard mortgagee clause. Any rent insurance or use and occupancy insurance carried by Lessee shall provide that, in the event of loss or damage to the premises, the proceeds shall be payable to Lessor to be held by Lessor as security for the payment of the rent and additional charges due under this lease until the premises are restored. All insurance shall be obtained from companies licensed to do business in the state in which the premises are located and which have at least a Class X rating by Best's Insurance Guide or are otherwise approved by Lessor. Lessee shall procure policies for all insurance for periods of not less than one year and shall deliver to Lessor all policies or certificates of insurance with evidence of payment of all premiums. Lessee shall procure renewals of these policies from time to time before their respective expiration dates. All insurance policies shall be nonassessable and shall require thirty (30) days notice by registered mail to Lessor of any cancellation or change affecting Lessor's coverage under the policies. All property damage and business interruption policies of Lessee shall contain a waiver of any subrogation rights

which Lessee's insurers may have against Lessor, even if the loss suffered is caused by the act, omission or negligence of Lessor.

§4.3 ADJUSTING; PROCEEDS. Claims for loss due to damage to the premises under any policies provided for in this Lease shall be adjusted with the insurance companies (a) by Lessee in the case of any particular casualty resulting in damage or destruction not exceeding $10,000, or (b) by Lessor and Lessee, in the case of any particular casualty resulting in damage or destruction exceeding $10,000 in the aggregate. Subject to the rights of any mortgagee, the proceeds of any insurance shall be payable as follows:

(1) With respect to any loss not exceeding $10,000 in the aggregate, proceeds shall be paid to Lessee, who shall hold them in trust for the purpose of paying the costs of repair and restoration; and

(2) With respect to losses exceeding $10,000 in the aggregate, the proceeds shall be paid to Lessor and shall be applied to pay the costs of repair and restoration.

§4.4 JOINT EFFORTS. Lessee and Lessor shall cooperate in attempts to collect any insurance proceeds that may be due in the event of loss, and Lessee shall execute and deliver to Lessor such proofs of loss and other instruments which may be required for the purpose of recovering these proceeds.

§4.5 WAIVER OF SUBROGATION. Lessee agrees to look solely to the proceeds of his own insurer for indemnity against exposure for loss of property or business interruption. Lessee warrants that its property and business interruption insurers shall have no rights against Lessor

by virtue of assignment, subrogation, loan agreement or otherwise.

§4.6 CANCELLATION OF INSURANCE. If any insurance policy covering the premises or any part of it is cancelled or is threatened by the insurer to be cancelled, or if the coverage thereunder is reduced in any way by the insurer for any reason, and if Lessee fails to remedy the condition giving rise to cancellation, threatened cancellation, or reduction of coverage within 48 hours after notice thereof by Lessor, Lessor may, at its option, either (i) reenter the premises forthwith by leaving upon the premises a notice in writing of its intention to do so (in which case the provisions of paragraph VIII shall apply) or (ii) enter the premises and remedy the condition giving rise to such cancellation, threatened cancellation or reduction, and Lessee shall forthwith pay the cost thereof to Lessor (which cost may be collected by Lessor as rent) and Lessor shall not be liable for any damage or injury caused to any property of Lessee or of others located on the premises as a result of any such entry.

§4.7 LOSS AND DAMAGE. Lessor shall not be liable for any death or injury occurring on the premises, nor for the loss of or damage to any of the personalty or other property of Lessee or of others by theft or otherwise, from any cause whatsoever. Without limiting the generality of the foregoing, Lessor shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, dampness, gas, electricity, water, rain, snow, or leaks from any part of the premises or from the pipes, appliances or plumbing works or from the roof, street or subsurface or from any other place by any other cause whatsoever. Lessor shall not be liable for any such damage caused by other persons or occupants of adjacent property, or the public, or caused

by operations in construction of any private, public or quasi-public work. All of the personalty or any other property of Lessee kept or stored on the premises shall be kept or stored at the risk of Lessee.

V.

THE PREMISES

§5.1 USE AND SERVICES. Lessee will operate a Burger King Restaurant on the premises in accordance with the terms of the Burger King Franchise Agreement entered into by Lessee contemporaneously with this Lease (the "Franchise Agreement"). The premises will be used for no other purpose. Lessee agrees that it will not use in connection with the operation of or as additional parking for its business on the premises any property other than the premises, except in accordance with the provisions of paragraph XIII. Notwithstanding anything in this Lease to the contrary, this Lease is conditioned upon the faithful performance by Lessee of the Franchise Agreement, and a default in the terms of the Franchise Agreement shall be a default of this Lease.

Except as may be otherwise specifically provided by the terms of this Lease or the Franchise Agreement, Lessor shall not be required to furnish to Lessee any facilities or services of any kind whatsoever, such as, but not limited to water, sewer, steam, heat, gas, hot water, electricity, light and power.

§5.2 REPAIRS AND MAINTENANCE. Lessee shall, at all times during the term, at its own costs and expense, keep and maintain the premises and all fixtures and personalty located on it in good order and condition, and subject to all applicable terms of paragraphs 5.3 and 5.8, shall make all necessary and desirable repairs, restorations

and replacements thereof, structural and nonstructural, seen or unforeseen (hereinafter collectively called "repairs"), and shall use all reasonable precaution to prevent waste, damage or injury. Lessee shall also maintain in good repair and free from dirt, snow, ice, rubbish and other obstructions or encumbrances, the sidewalks, parking areas, yards, plantings, gutters and curbs in front of and adjacent to the premises.

In the event that Lessee fails or neglects to make all necessary repairs or fulfill its other obligations as set forth above, Lessor or its agents may enter the premises for the purpose of making such repairs or fulfilling those obligations. All costs and expenses incurred as a consequence of Lessor's action shall be repaid by Lessee to Lessor within 15 days after Lessee receives copies of receipts showing payment by Lessor for such repairs or other obligations. These receipts shall be prima facie evidence of the payment of the charges paid by Lessor. Except in the case of emergency, Lessor shall give Lessee ten (10) days notice before taking any such action.

§5.3 ALTERATIONS. Lessee agrees that it will at its own cost and expense make such reasonable alterations to the interior or exterior of the premises as may reasonably be requested by Lessor from time to time in order to modify the appearance of the building to reflect the then current image of Burger King Restaurants.

Lessee shall not at any time make any alteration, change, addition or improvement (hereinafter collectively called "alterations") in or to the interior or exterior of the premises without the prior written consent of Lessor. In the event consent is given:

(a) the alterations shall be performed in a first class workmanlike manner at Lessee's sole expense, and

shall not weaken or impair the structural strength or lessen the value of the premises, or change the purpose for which premises may be used;

(b) the alterations shall be made according to plans and specifications therefor, which shall be first submitted to and approved in writing by Lessor;

(c) before the commencement of work on any alterations, such plans and specifications shall be approved by all governmental authorities having jurisdiction and any public utility company having an interest in the alterations;

(d) before the commencement of any alterations, Lessee shall pay the amount of any increase in premiums on insurance polices for endorsements covering the risk during work on the alterations, and workmen's compensation insurance covering all persons employed in connection with that work.

(e) if the estimated cost of the alteration exceeds $5,000.00, Lessee shall furnish to Lessor a surety bond of a company acceptable to Lessor, in an amount equal to the estimated cost of such work, or other security satisfactory to Lessor, guaranteeing the completion of such work, free and clear of all liens and encumbrances.

(f) before the commencement of any alterations which involve a contract for labor, services, materials, or supplies in excess of $5,000.00, Lessee shall deliver to Lessor, where permitted by law, either (1) a duplicate original of the contract, if in writing, which shall provide that no lien or claim against the premises or the equipment on it shall be created or filed as a result of performance of work under the contract

or (2) a written waiver by the architect, engineer, contractor, subcontractor, materialman, mechanic, or other person contracting to furnish such labor, services, materials or supplies, of all lien rights which he or it might otherwise have against the premises or Lessor's interest in it.

All buildings, additions, improvements, fixtures and appurtenances in or on the premises at the commencement date and those which may be erected, affixed or installed in or on the premises during the term are deemed to be and shall immediately become part of the premises and the sole property of Lessor. All personalty installed by Lessee (except signs, trademarks and other insignia of Lessor) shall remain the property of Lessee.

§5.4 LIENS. Should Lessee cause any alterations or repairs to be made to the premises, or cause any labor to be performed or material to be furnished, neither Lessor nor the premises shall under any circumstances be liable for the payment of any expense incurred, and all such alterations and repairs shall be made and performed at Lessee's expense. If, because of any act or omission of Lessee, any mechanic's or other lien, charge, claim or order for the payment of money shall be filed against the premises or against Lessor, Lessee shall, at its own cost and expense, cause it to be cancelled and discharged of record or bonded within fifteen (15) days after notice of filing thereof. In the event that the Lessee fails to cause any such mechanics' or other lien, charge or order to be cancelled and discharged or bonded, then, in addition to any other right or remedy of the Lessor, the Lessor may, at its option, cancel or discharge it by paying the amount claimed to be due into Court or directly to any claimant and the amount so paid by Lessor and all costs and expenses including attorneys' fees incurred for the cancella-

tion or discharge of such lien shall be due from the Lessee to the Lessor as an additional charge payable on demand.

§5.5 SIGNS. Lessee shall not place any signs or symbols on any portion of the premises without the prior written approval of Lessor.

§5.6 INSPECTION. Fee owner, Lessor or their representatives shall have the right to enter the premises at reasonable hours of any business day to ascertain if the premises are in proper repair and condition.

§5.7 LICENSE AND LAWS. The Lessee shall, at its own cost and expense, obtain all necessary licenses and/or permits which may be required for the conduct of its business; and Lessee shall, at its own cost and expense, promptly observe and comply with all present and future laws, ordinances, requirements, orders, directions, rules and regulations (referred to generally as "regulations") of governmental authorities having or claiming jurisdiction over the premises or the conduct of Lessee's business. Lessee may contest in good faith, after notice to Lessor, by appropriate proceedings conducted promptly at Lessee's own expense, in Lessee's name (and/or whenever necessary and with Lessor's consent, in Lessor's name), the validity or enforcement of any such regulation; provided that (i) such contest or any associated deferment of payment does not subject Lessor to a fine or other criminal liability, or subject the premises to any encumbrance, (ii) Lessee diligently prosecutes such contest to a final determination by the governing authority, and (iii) Lessee furnishes Lessor with any security that Lessor may reasonably request in connection with such contest.

§5.8 DAMAGE OR DESTRUCTION. If, during the term, the premises or the personalty or fixtures on it are destroyed or damaged in whole or in part by fire or other cause, Lessee shall give Lessor immediate notice, and

Lessee, at its own cost and expense, shall cause the prompt repair, replacement and rebuilding of same ("restoration"), subject to paragraphs 5.2 and 5.3 of this Lease. The restored building, personalty or fixtures shall reflect the then current image of Burger King Restaurants and conform to the then current design and specifications of Lessor. Lessor shall in no event be called upon to repair, replace or rebuild any such buildings, fixtures or personalty, nor to pay any of the costs or expenses thereof beyond or in excess of any insurance proceeds, as provided in this Lease.

All insurance proceeds received by Lessor or by any Insurance Trustee on account of such damage or destruction, less the actual cost, fees and expenses, if any, incurred in connection with adjustment of the loss, shall be applied by Lessor to pay or reimburse Lessee for the payment of the cost of the restoration, including the cost of temporary repairs or for the protection of property pending the completion of permanent restoration, and shall be paid out from time to time as restoration progresses upon the written request of Lessee, accompanied by evidence satisfactory to Lessor that:

(a) (1) the sum then requested either has been paid by Lessee or is justly due to contractors, subcontractors, materialmen, or other persons who have rendered services or furnished materials for the restoration pursuant to a certificate or claim for payment ("certificate"), and that the sum then requested does not exceed the amount of the services and materials described in the certificate;

(2) except for the amount, if any, stated in the certificate to be due for services or materials, there is no outstanding indebtedness known to the persons

signing such certificate, after due inquiry, which is then due for labor, wages, materials, supplies, or services in connection with the restoration;

(3) the cost of the restoration required to be done does not exceed the insurance proceeds, and

(b) that there have not been filed against the premises any vendor's, contractor's, mechanic's, laborer's or materialman's statutory or similar lien ("liens") which has not been discharged of record, except those that will be discharged upon payment of the sum requested in the certificate, or bonded or contested in accordance with paragraph 5.4.

Upon compliance with the above provisions, Lessor or the Insurance Trustee shall, out of such insurance proceeds and such other funds as may have been made available, pay or cause to be paid to Lessee or its designee, the respective amounts due.

If the insurance proceeds and other funds deposited with Lessor or the Insurance Trustee, less the actual cost, fees and expenses, if any, incurred in connection with the adjustment of the loss, are insufficient to pay the entire cost of the restoration, Lessee will pay the deficiency. At least ten (10) days before the commencement of restoration, Lessee shall notify Lessor of its intention to restore the premises. During restoration, this Lease shall not terminate, nor shall the rental and other charges payable under this Lease be abated or be affected in any manner.

§5.9 WARRANTIES: DISCLAIMER. Lessor shall provide Lessee with the benefit of any warranties provided by the building contractor. Lessor expressly disclaims any other warranty, either express or implied, and Lessee acknowledges that neither Lessor nor its agents have made

any representations or promises with respect to the premises except as expressly set forth in this Lease, and no rights, easements or licenses are acquired by Lessee by implication or otherwise except as expressly set forth herein. The taking of possession of the premises by Lessee shall be conclusive evidence that the Lessee has accepted the premises "*AS IS*". Lessor agrees to cooperate with and assist Lessee in asserting claims against contractors or others providing work and/or services to the premises.

§5.10 CONTRACTS. Lessee shall not without Lessor's consent enter into any service contract or agreement relating to the furnishing of any services to the premises or the occupants of it unless such contract or agreement shall by its terms be terminable on no more than thirty (30) days notice or shall expressly provide that it shall not become binding on Lessor in the event that this Lease is terminated or expires. Lessee shall furnish Lessor with copies of all service contracts or agreements affecting the premises that are now in existence or that are subsequently entered into.

VI.

TAXES AND OTHER CHARGES

§6.1. PAYMENT. Lessee shall pay on or before the last day on which payment may be made without penalty or interest, all taxes, assessments, charges for public utilities, excises, levies, license and permit fees and other governmental impositions and charges of every kind and nature whatsoever ("charges"), which may be assessed, imposed, or become due and payable in connection with the ownership, occupancy or possession of the premises or the fixtures or personalty on it, or any charges which may be imposed in lieu of, or as a substitution for, any such charges. At any time after the time for payment of each charge,

upon Lessor's request, Lessee shall exhibit to Lessor satisfactory evidence of payment. All charges assessed or imposed for the fiscal periods in which the term of this Lease commences and terminates shall be apportioned.

§6.2. CONTESTS. Lessee has the right to promptly contest or review any of the charges by appropriate proceedings ("proceedings") at its own expense, and if necessary, with the prior written consent of Lessor, in the name of Lessor. Lessee may defer payment of a contested charge only if, before instituting any proceedings, Lessee furnishes to Lessor security satisfactory to Lessor and sufficient to cover the amount of each contested charge, with interest and penalties for the period which the proceedings may be expected to take. Notwithstanding the furnishing of security (other than a cash deposit), Lessee shall promptly pay each contested charge if, at any time, the premises or any part of it are in danger of being sold, forfeited or otherwise lost or Lessor becomes subject to criminal or any other liability for such non-payment; provided that in that event, if Lessee has made a cash deposit to Lessor, Lessor may pay each contested charge out of the deposit. When any contested charge is paid or cancelled, any balance of any cash deposit not so applied shall be repaid to Lessee without interest. All proceedings shall be begun as soon as possible after the imposition or assessment of any contested item and shall be diligently prosecuted to final adjudication. If there is any refund with respect to any contested charge based on a payment by Lessee, Lessee shall be entitled to it to the extent of such payment.

§6.3 LIMITATION; SUBSTITUTION. Nothing contained in this Lease shall be construed to require Lessee to pay any inheritance, estate, succession, transfer, gift, franchise, corporation, income or profit tax, or capital levy that is or may be imposed upon Lessor, its successors or assigns;

provided, however, that if at any time during the term of this Lease the methods of taxation prevailing at the commencement date are altered so that in lieu of or as a substitute for the whole or any part of the taxes, assessments, levies, impositions or charges (collectively "assessments") now levied, assessed or imposed ("imposed") on real estate and improvements thereon, there is imposed

(1) an assessment made wholly or partially as a capital levy, or

(2) an assessment measured by or based in whole or in part on the premises, or

(3) a license fee measured by the rent payable by Lessee under this Lease,

then to the extent that such assessments or portion thereof would be payable if the premises were the only asset of Lessor subject to the assessments, Lessee shall pay these assessments in the same manner as provided in this Lease for payment of real estate taxes.

§6.4 ESCROW FUND. If, during the term of this Lease, Lessor or any mortgagee requests Lessee to provide an escrow fund for payment of real estate taxes, Lessee agrees that upon such request it will promptly deposit with Lessor or its designated mortgagee, for each month or portion thereof since the due date of the previous tax bill, one-twelfth (1/12) of the latest year's tax obligation (the "monthly escrow sum"), and that it will continue to deposit the monthly escrow sum on the first day of each subsequent month, so that as each installment of real estate taxes becomes due and payable, Lessee will have deposited a sum sufficient to pay it. All of these deposits (the "escrow funds") shall be received and held in trust; provided, however, that unless otherwise required by law, Lessor

or its designated mortgagee shall not be required to maintain the escrow funds in a segregated account nor invest them in interest bearing accounts or securities nor pay any interest on them. When the real estate taxes become due and payable, Lessor or its mortgagee shall promptly pay them from the escrow funds and shall promptly forward to Lessee receipts or other satisfactory evidence of payment. In the event that the amount of the real estate taxes assessed or imposed against the premises has not been fixed at the time when any monthly escrow sum is due, the monthly escrow sum shall be one-twelfth (1/12) of the amount of real estate taxes assessed or imposed against the premises for the preceding year, subject to adjustment when the actual amount of the real estate taxes is ascertained. If required by Lessor or any mortgagee, the provisions of this paragraph shall be applicable to any additional charges due under this Lease.

VII.

INDEMNIFICATION

§7.1 Lessee shall indemnify and save Lessor harmless from and against all costs, expenses, liabilities, losses, damages, injunctions, suits, actions, fines, penalties, claims and demands of every kind or nature, including reasonable attorneys' fees, by or on behalf of any person, party or governmental authority whatsoever arising out of (a) any failure by Lessee to perform any of its obligations under this Lease, (b) any accident, injury or damage which occurs in or about the premises, however occurring, (c) any matter arising out of the condition, occupation, maintenance, alteration, repair, use or operation of the premises or any part of it, (d) the contest or challenge by Lessee of any imposed tax, assessment, or other charges, or (e) any

other matter arising from or relating to Lessee's occupation of the premises.

VIII.

ENFORCEMENT

§8.1 DEFAULT. Each of the following events is a default and a breach of this Lease by Lessee:

(a) If Lessee files a petition in bankruptcy, insolvency, dissolution or for reorganization or arrangement under the laws of the United States or of any state, or voluntarily takes advantage of any such law or act or is dissolved or makes an assignment for the benefit of creditors;

(b) If involuntary proceedings under any bankruptcy law or insolvency act or for the dissolution of a corporation are instituted against Lessee or if a receiver or trustee is appointed of all or substantially all of the property of Lessee and such proceedings are not dismissed or such receivership or trusteeship vacated within ninety (90) days after such institution or appointment;

(c) If Lessee vacates or abandons the premises or indicates its intention to do so;

(d) If this Lease or the estate of Lessee hereunder is transferred to any other person or party, except in a manner permitted by the terms of this Lease;

(e) If Lessee fails to pay Lessor any rent or other charge when it becomes due and payable and fails to make such payment within ten (10) days after notice thereof by Lessor to Lessee;

(f) If Lessee fails to perform any of its obligations under this Lease and such non-performance continues

for a period within which performance is required to be made by specific provision of this Lease or, if no such period is provided, for a period of thirty (30) days after notice thereof by Lessor to Lessee; or, if such performance cannot be reasonably had within such thirty day period, Lessee has not in good faith commenced such performance within such thirty day period or has not diligently proceeded therewith to completion;

(g) If the Lessee or any agent of Lessee falsifies any report required to be furnished to Lessor pursuant to the terms of this Lease and fails to notify Lessor of such falsification within sixty (60) days of submission of such report.

In the event of a default under subparagraphs (a), (b), (c) or (d), above, the term of this Lease shall automatically terminate without additional notice to Lessee. In the event a default under subparagraphs (e), (f) or (g), above, shall occur and be continuing after the notice period provided, Lessor has the right, in addition to any other rights or remedies it may have, to terminate this Lease without further notice to Lessee, and in such event the term hereof shall expire in the same manner and with the same force and effect, except as to Lessee's liability, as if the expiration of the time fixed in such notice was the original term expiration date.

§8.2 CURE BY LESSOR. After expiration of the applicable period of notice, or without notice in the event of any emergency, Lessor at its option may, but shall not be obligated to, make any payment required of Lessee or perform any obligation of Lessee, and the amount Lessor pays, or the cost of its performance, together with interest thereon at the highest legal rate permitted, shall be deemed

to be an additional charge payable by Lessee on demand. Lessor shall have the right to enter the premises for the purpose of correcting or remedying any default, but neither any expenditure nor any such performance by Lessor shall be deemed to waive or release Lessee's default or the right of Lessor to take such action as may be otherwise permissible in the case of default. The Lessor shall have no liability to the Lessee for any loss or damages resulting from any such action by the Lessor, and entry by the Lessor under the provisions of Article V or VIII shall not constitute breach of the covenant for quiet enjoyment or an eviction.

§8.3 SURRENDER; REENTRY; RELETTING. In the event of cancellation or termination of this Lease either by operation of law or otherwise, or in the event Lessor gives notice to Lessee to vacate the premises pursuant to a default of this Lease, Lessee agrees to immediately peacefully surrender the premises to Lessor, and if Lessee refuses to do so, Lessor may, among other things, reenter and repossess the premises, using such force for that purpose as may be necessary, and Lessee shall nevertheless remain and continue to be liable to Lessor in a sum equal to all rent, additional rent and other charges payable under this Lease through the original term expiration date. If Lessor shall so reenter, Lessor may repair and alter the premises in any manner as Lessor deems reasonably necessary or advisable, and/or may, at its election, let or relet the premises or any part of it for the whole or any part of the remainder of the term or for a longer period, in Lessor's name or as the agent of Lessee, and out of any rent collected or received from subtenants or as a result of such letting or reletting, Lessor shall first pay to itself the cost and expense of retaking, repairing and/or altering the premises, and the cost and expense

of removing all persons and property from the premises; second, pay to itself the cost and expense sustained in securing any new tenant, and if Lessor maintains and operates the premises, the cost and expense of operating and maintaining the premises; and, third, pay to itself any balance remaining on account of the liability of Lessee for the sum equal to all rent, additional rent and other charges due from Lessee through the original term expiration date. Should Lessor, pursuant to this paragraph, not collect rent which, after deductions is sufficient to fully pay to Lessor a sum equal to all rent, additional rent and other charges payable through the original term expiration date, the balance or deficiency shall, at the election of Lessor, be paid by Lessee on the first of each month.

§8.4 ACCELERATION. Whether or not Lessor relets the premises, Lessor may recover against Lessee as damages for loss of the bargain and not as a penalty, in addition to any other damages, an aggregate sum which, at the time of the termination of this Lease, represents the then present worth of the excess, if any, of (a) the sum of the rent, additional rent and all other charges payable by Lessee hereunder that would have accrued for the balance of the term, over (b) the amount of rent loss which Lessee proves that Lessor could reasonably avoid over the balance of the term.

§8.5 SUITS. Suit or suits for the recovery of the deficiency or damage or for any installment or installments of rent, additional rent or any other charge due under this Lease may be brought by Lessor at any time or, at Lessor's election, from time to time, and nothing in this Lease shall be deemed to require Lessor to wait until the original term expiration date to bring suit.

§8.6 WAIVER. Lessee hereby expressly waives service of any notice of intention to reenter. Lessee hereby waives any and all rights to recover or to regain possession of the premises or to reinstate or to redeem this Lease as permitted or provided by any statute, law or decision now or hereafter in force and effect. No receipt of moneys by Lessor from Lessee after the cancellation or termination of the Lease shall reinstate, continue or extend the Lease, or affect any prior notice given to Lessee or operate as a waiver of the right of Lessor to enforce the payment of rent and additional rent then due or subsequently falling due, or operate as a waiver of the right of Lessor to recover possession of the premises by suit, action, proceeding or other remedy, and any and all moneys so collected shall be deemed to be payments on account of the use and occupancy of the premises, or at the election of the Lessor, on account of Lessee's liability under this Lease.

§8.7 PROOF OF CLAIM. Nothing in this Article shall limit or prejudice the right of Lessor to prove and obtain as liquidated damages in any bankruptcy, insolvency, receivership, reorganization or dissolution proceeding an amount equal to the maximum allowed by any statute or rule of law governing such proceeding, whether or not such amount is greater, equal to or less than the amount of the damages referred to in any of the preceding sections.

§8.8 INJUNCTION. In the event of a breach or a threatened breach by Lessee of any of its Lease obligations, Lessor shall have the right to enjoin and restrain the breach and to invoke any remedy allowed by law or in equity, in addition to other remedies provided in this Lease.

§8.9 INDEPENDENT RIGHTS. The rights and remedies of Lessor are distinct, separate and cumulative, and no one of them, whether or not exercised by Lessor, shall be deemed to be to the exclusion of any of the others.

§8.10 NON-WAIVER. The failure of Lessor to insist upon strict performance of any of Lessee's obligations under this Lease shall not be deemed a waiver of any rights or remedies that Lessor may have and shall not be deemed a waiver of any subsequent breach or default by Lessee.

§8.11 WAIVER OF EXEMPTION FROM DISTRESS. Lessee agrees that notwithstanding anything contained in any statute, enactment or other law of the state in which the premises are located or of any other jurisdiction, none of the personalty located on the premises shall be exempt from levy for distress for rent in arrears, and that if Lessee makes any claim for such an exemption, this agreement may be pleaded as an estoppel against Lessee in any appropriate action.

IX.

NO RENT ABATEMENT

§9.1 Unless specifically provided in this Lease, no abatement, diminution, or reduction of rent, additional rent, charges or other compensation shall be claimed by or allowed to Lessee, or any persons claiming under Lessee, under any circumstances, whether for inconvenience, discomfort, interruption of business, or otherwise.

X.

CONDEMNATION

§10.1 ENTIRE AWARD. In the event that the premises or any part of it is taken in condemnation proceedings

or by exercise of any right of eminent domain (or by settlement agreement in lieu thereof between Lessor and those authorized to exercise such right), Lessor shall be entitled to collect the entire amount of any award made—without deduction for any estate vested in or owned by Lessee—subject only to the rights of any mortgagee and to Lessee's rights as set forth in this Lease. Lessee agrees to execute any and all documents that may be required to facilitate collection by Lessor of any and all such awards. Lessee shall have no right to participate in any condemnation proceedings or agreement except for the purposes described in §10.4.

§10.2 SUBSTANTIAL TAKING. If at any time during the Lease term, the whole or substantially all of the premises is taken or condemned, this Lease shall terminate and expire on the date on which title vests in the condemning authority, upon which the rent provided to be paid by Lessee shall be apportioned and paid to that date, and Lessee shall have no claim against Lessor for the unexpired term of this Lease or for damage or for any other reason whatsoever. For the purposes of this Section, "substantially all of the premises" shall be deemed to have been taken if, in the sole opinion of Lessor, the portion of the premises not taken cannot be repaired or reconstructed in such a way that, by using only the amount of the net award available from the taking, there remains a complete, rentable structure capable of producing a proportionately fair and reasonable net annual income after payment of all operating expenses, rent, additional rent and all other charges payable by Lessee, and after performance by the Lessee of all its obligations under this Lease.

§10.3 PARTIAL TAKING. In the event of a partial taking (any taking which is not "substantial"), this Lease

shall not terminate, and Lessee shall promptly proceed to restore the remainder of the building on the land (if affected by the taking) to a complete, independent and self-contained architectural unit, usable for the purposes contemplated by this Lease, and Lessor shall pay to Lessee, subject to the same provisions and limitations specified herein with respect to insurance proceeds, the cost of restoration, which payment shall in no event exceed a sum equal to the amount of any separate award made for such restoration. Any deficiency will be paid by Lessee. Such restoration shall be subject to and shall be performed in accordance with the provisions of Paragraph 5.3, except that any surety bond shall be in the amount, if any, by which the estimated cost of the work exceeds said separate award for the restoration. In the event that there is no separate award for restoration, the amount shall be fixed and settled by mutual agreement or by arbitration as provided in this Lease.

If this Lease does not terminate as provided in §10.2, the new minimum annual rent after the date of taking shall be the minimum annual rent payable by Lessee immediately prior to the taking, reduced by 13.4% of any portion of the award or awards recovered by Lessor which are applied to the reduction of any mortgage to which this Lease is subject and subordinate or are not otherwise applied to Lessee's cost of demolition, repair and restoration. The new minimum monthly rent shall be 1/12 (one-twelfth) of the new minimum annual rent.

§10.4 LESSEE'S INDEPENDENT AWARD. Nothing in this article shall preclude Lessee from pursuing any independent action permitted by law or from participating in the condemnation proceedings, but only for the purpose of securing an independent award for loss of business or damage to personalty.

XI.

SUBORDINATION

§11.1 This Lease shall be fully subordinate to any mortgage and/or collateral assignment of lease against the premises which the fee owner, Lessor and/or their assigns has or subsequently obtains upon the premises.

The Lessee hereby grants a power of attorney to the Lessor with full power to act as its attorney in fact and to execute on behalf of the Lessee any and all documents that may be required by a mortgagee and/or assignee evidencing the Lessee's full subordination of the Lessee's interest to any mortgage and/or collateral assignment of lease that may be entered into by Lessor, the fee owner or their assigns. Lessee hereby agrees to execute, without charging Lessor, any and all documents that it is requested to execute to evidence this subordination. However, Lessee shall not be required to execute any promissory notes or other evidences of indebtedness which would create any personal liability on behalf of Lessee.

XII.

ASSIGNMENT

§12.1 BY LESSOR. This Lease shall be fully assignable by the Lessor or its assigns.

§12.2 BY LESSEE. Neither Lessee, nor Lessee's successors or assigns, shall (unless expressly permitted in this Lease) assign, mortgage, give as security, pledge or encumber this Lease, in whole or in part, by operation of law or otherwise, or sublet the premises, in whole or in part, or permit the premises or any portion of it to be used or occupied by others, or enter into a management contract or other arrangement whereby the premises shall be

managed and operated by anyone other than the owner of Lessee's leasehold estate, without the prior consent in writing of Lessor in each instance. If this Lease is assigned or transferred, or if all or any part of the premises is sublet or occupied by anybody other than Lessee, Lessor may collect rent from the assignee, transferee, subtenant or occupant, and apply the net amount collected to the rent reserved in this Lease, but no such assignment, subletting, occupancy or collection shall be deemed a waiver of any covenant or condition of this Lease, or the acceptance of the assignee, transferee, subtenant or occupant as lessee, or a release of Lessee from the performance or further performance by Lessee of its obligations under this Lease, and Lessee shall continue to be liable for all its obligations under this Lease. The consent by Lessor to an assignment, mortgage, pledge, encumbrance, transfer, management contract or subletting shall not in any way be construed to relieve Lessee from obtaining the express consent in writing of Lessor in each instance to any subsequent similar action that the Lessee may intend to take. Providing Lessee remains liable for all its obligations under this Lease, Lessor shall consent to an assignment of this Lease to an individual, partnership or corporation to which the Franchise Agreement has been assigned.

§12.3 ASSUMPTION BY ASSIGNEE. An assignment made with Lessor's consent or as otherwise permitted shall not be effective until Lessee delivers to Lessor an executed counterpart of such assignment containing an agreement, in recordable form, executed by the assignor and the proposed assignee, in which the assignee assumes the performance of the obligations of the assignor under this Lease to the original term expiration date.

XIII.

ADDITIONAL PROPERTY

In the event Lessee (for purposes of this paragraph if Lessee is a group of more than one person the term "Lessee" shall mean any member of the Lessee group) or any corporation, partnership or other entity in which Lessee has an interest or any member of Lessee's immediate family (Lessee or such other person or entity shall hereinafter be referred to as "Vendee") acquires the right to purchase property which, in the sole opinion of Lessor, is capable of being used either as additional parking or for any other purpose connected with the operation of the premises ("additional property"), Lessor shall have an option to assume Vendee's right to purchase such property without cost or charge to Lessor. Vendee agrees to submit to Lessor a copy of the purchase or option contract and all other relevant documents within ten days after execution thereof and a reasonable period of time in advance of any scheduled closing date. Lessor shall have twenty days thereafter within which to notify Vendee of Lessor's intention to accept or reject its option. If Vendee's rights to purchase additional property are not assignable, or if Vendee purchases additional property without previously granting Lessor the option to acquire it, Lessor shall have the option to purchase the additional property from Vendee at Vendee's purchase price, under the terms of Lessor's standard property Purchase Agreement to be executed by Vendee and Lessor upon exercise of the option. Vendee agrees to submit to Lessor a copy of the purchase agreement and all other relevant documents within fifteen days after closing, and Lessor shall have thirty days thereafter within which to notify Vendee of its intention to accept or reject this option.

In the event Lessor acquires the additional property from Vendee as set forth above, Lessee and Lessor agree to enter into a Lease of that additional property under the then current terms of Lessor's standard Lease for additional property.

In the event Lessor fails to exercise its options as set forth above, then at such time as this Lease expires or is terminated, Lessor has the option, to acquire the additional property by purchasing it for its fair market value or 3 times Vendee's purchase price, whichever is less, under the terms of Lessor's standard property Purchase Agreement, to be executed by Vendee and Lessor upon exercise of the option. Lessor must notify Vendee of its election to exercise this option within thirty (30) days after expiration or termination of this Lease. Should Lessor and Vendee be unable to agree upon a purchase price within thirty days after Vendee is notified by Lessor that Lessor desires to exercise the option, Lessor and Vendee shall within ten days following the end of said thirty day period separately hire disinterested qualified real estate appraisers who are authorized to appraise property in the county where the additional property is located and who are members of either The Society of Real Estate Appraisers, The American Institute of Real Estate Appraisers or The American Society of Appraisers. If either Lessor or Vendee fails to appoint an appraiser within ten days after being notified of the appraiser retained by the other party, the single appraiser hired shall determine the fair market value of the property. If both parties select an appraiser, the two appraisers shall meet and attempt to agree on a fair market value of the property. If they are unable to agree on the value within fifteen days after the second appraiser was appointed, they shall select a third appraiser who shall determine the fair market value. Lessor and

Vendee shall be responsible for the fee charged by the respective appraisers they selected and shall split the cost of the third appraiser. If after being informed of the fair market value Lessor indicates that the purchase price is unacceptable, it may rescind its election to purchase the additional property, upon notice to Vendee within 20 days after being informed of the fair market value of the property, but must pay the total cost of the appraisal.

In the event Lessor acquires additional property from Vendee under either of the above options, Vendee shall furnish to Lessor evidence that he has good and marketable title to the additional property, and title shall be conveyed to Lessor in fee simple, free and clear of any liens, encumbrances or restrictions upon payment of the purchase price. Closing shall be within ninety (90) days after determination of the purchase price, subject to any extension permitted under the terms of Lessor's standard property agreement.

In the event Vendee acquires a lease, license or other right of any kind, save and except by purchase, to use or occupy additional property from any person other than Lessor, Vendee agrees that, at such time as this Lease expires or is terminated, Lessor has the option, exercisable within thirty (30) days of such expiration or termination by notice to Vendee and at no cost or charge to Lessor, to assume such lease, license or other right to use or occupy such additional property from Vendee and Vendee hereby agrees to execute and provide such documents and other assurances reasonably required by Lessor to give full force and effect to this provision.

For purposes of this paragraph, notice to the Lessee in the manner indicated in Section 14.2 shall be deemed to be notice to Vendee.

XIV.

MISCELLANEOUS

§14.1 ARBITRATION. In the event of arbitration under §10.3 of this Lease, the arbitration shall be held in the City of Miami, Florida, in accordance with the rules of the American Arbitration Association requiring the appointment of three (3) arbitrators.

§14.2 NOTICES. Every notice, approval, consent or other communication authorized or required by this Lease shall be effective if given in writing and if hand delivered or sent by United States Registered or Certified Mail, Return Receipt Requested, with postage prepaid, and addressed directly to Lessor at its offices at P. O. Box 520783, General Mail Facility, Miami, Florida 33152, and to Lessee at the premises, or at such other address as either party shall from time to time designate in writing. Every notice shall be deemed to be effective upon delivery, if delivered, or on the second business day after mailing, if mailed. All payments to the Lessor shall be made at the address designated for notices to the Lessor.

§14.3 CONSTRUCTION. In the event that any of the provisions of this Lease shall by court order be held invalid or in contravention of any of the laws of the United States or of any state having jurisdiction over the subject matter or of any dispute arising under it, such invalidation shall not serve to affect the remaining portion of this Lease. To the extent permitted by the laws of the state where the premises are located, this Lease shall be governed by and construed in accordance with the laws of the State of Florida.

§14.4 SUCCESSORS. This contract shall bind Lessor and Lessee and their successors, heirs, assigns, administrators, and legal representatives, as the case may be.

§14.5 RECORDING. Lessee shall upon request of Lessor execute a short form of this Lease on a written document witnessed and acknowledged in a form capable of being recorded in the public records of the county where the premises are located. Lessee shall not record this Lease without prior written consent of Lessor.

§14.6 COUNTERPARTS. This agreement is being executed simultaneously in counterparts, any one of which shall be deemed an original.

§14.7 NO AGENCY. The parties hereto agree that the business relationship created by this Lease is solely that of Lessor and Lessee. Nothing contained in this Lease shall make Lessee an agent, legal representative, partner, subsidiary, joint venturer or employee of Lessor. Lessee shall have no right or power to, and shall not bind or obligate Lessor in any way, manner or thing whatsoever, nor represent that it has any right to do so.

§14.8 TIME OF THE ESSENCE. Time shall be of the essence in every part of this Lease.

§14.9 BINDING EFFECT. This agreement shall become immediately binding on the parties to this Lease on the date the last party signs it, notwithstanding that the term of this Lease shall commence upon a future date.

§14.10 HEADINGS. The table of contents preceding this Lease and the headings of the paragraphs and subparagraphs are inserted solely for the convenience of reference and shall not constitute a part of this Lease, nor limit, define or describe the scope or intent of this Lease.

§14.11 JOINT AND SEVERAL LIABILITY. If Lessee consists of more than one person, each individual's liability under this Lease shall be joint and several.

§14.12 DEFINITIONS.

(a) The term "Lessor" as used in this Lease shall mean the owner in fee of the premises for the time being, or the owner of the leasehold estate created by an underlying lease, or the mortgagee of the fee or of such underlying lease in possession for the time being, so that in the event of any sale or sales of the premises, or of the making of any such underlying lease, or of any transfer or assignment or other conveyance of such underlying lease and the leasehold estate created by it, the seller, lessor, transferor or assignor shall be and is hereby entirely freed and relieved of all agreements, covenants and obligations of Lessor herein and it shall be deemed and construed without further agreement between the parties or their successors in interest or between the parties and the purchaser, lessee, transferee or assignee on any such sale, leasing, transfer or assignment that such purchaser, lessee, transferee or assignee has assumed and agreed to carry out any and all agreements, covenants and obligations of Lessor under this Lease.

(b) The term "Lessee" shall mean the lessee named in this Lease, and from and after any valid assignment or sublessee of Lessee's interest in this Lease pursuant to its provisions, the assignee or sublessee of this Lease.

(c) The term "mortgage" shall mean any mortgage, security interest, charge, deed of trust, or other similar encumbrance resulting from the financing or refinancing of the premises.

(d) The term "mortgagee" shall include any individual, firm, partnership, corporation, joint venture, investment trust bank or institution, or other business group or association lending funds to Lessor upon the security of the premises demised by this Lease

whether or not such mortgage is recorded, or upon Lessor's independent covenant not to otherwise encumber this Lease or the premises.

(e) The term "fixture" as used in this Lease means only that equipment used in conjunction with the building, including, without limitation, heating, ventilating and air conditioning systems, water heaters or softeners and items of similar nature, and does not include Lessee's restaurant equipment or other personalty.

The Lessor and Lessee have respectively signed this Lease as of the date indicated on the first page of this Lease

Witnesses for Lessor:

BURGER KING CORPORATION

/s/ Jean Willis

By: /s/ Z. (Illegible)
Executive Vice President

/s/ Allegra Ann Boyce

Attest: /s/ Helen O. Donaldson
Assistant Secretary

LESSOR
(Corporate Seal)

Witnesses for Lessee:

/s/ Stevie A. Bide

/s/ John J. Rudzewicz
John Rudzewicz

/s/ Karen D. Loy

/s/ Brian MacShara
Brian MacShara

LESSEE

(Jurats omitted in printing)

(Rudzewicz and MacShara signatures are notarized on June 4, 1979; Burger King signatures on June 22, 1979).

EXHIBIT "A"

4983 Dixie Highway
Drayton Plains, Michigan

LEGAL DESCRIPTION

Land in the Township of Waterford, County of Oakland and State of Michigan, described as:

Lots 11 and 12 of Supervisor's Plat No. 6 of part of the West 1/2 of the Southwest 1/4 of Section 3 and part of the East 1/2 of the Southeast 1/4 of Section 4, Town 3 North, Range 9 East, Waterford Township, Oakland County, Michigan, according to the plat thereof as recorded in Liber 47 of Plats, Page 26, Oakland County Records. Also described as beginning at the Southeast corner of Lot 11 and proceeding thence South 46 degrees 03 minutes 00 seconds West 250.00 feet; thence North 43 degrees 57 minutes 00 seconds West 174.24 feet; thence North 46 degrees 03 minutes 00 seconds East 250.00 feet; thence South 43 degrees 57 minutes 00 seconds East 174.24 feet to the point of beginning.

Subject to any and all reservations, restrictions, easements, rights of way, limitations and conditions of record.

ADDENDUM TO LEASE/SUBLEASE AGREEMENT

BETWEEN BURGER KING CORPORATION, LESSOR AND JOHN RUDZEWICZ AND BRIAN MacSHARA, LESSEE, DATED June 4, 1979

1. Notwithstanding anything as may be contained in Paragraph 9.1, Article 9 to the contrary, there shall be no rental abatement for the causes therein specified resulting in the Lessee's inability to conduct business upon the de-

mised premises by reason of such causes for a period of one (1) year from the cessation of business by reason of such causes. Upon the expiration of one (1) year, and for a period of thirty (30) days thereafter, should the lessee be unable to resume business operations through no fault of lessee, lessee shall have the option of continuing rental payments or upon notice in writing to lessor, terminate this lease.

2. This Addendum to Lease is being entered into in compliance with an administrative interpretation by the Corporation and Securities Bureau of the applicable laws, rules and regulations of the State of Michigan.

BURGER KING CORPORATION

By: /s/ Z. (Illegible)
Executive Vice President

/s/ Allegra Ann Boyce

Attest: /s/ Helen O. Donaldson
Assistant Secretary
LESSOR

/s/ Stevie [illegible]. Bide

/s/ John Rudzewicz
John Rudzewicz

/s/ Karen D. Loy

/s/ Brian MacShara
Brian MacShara
LESSEE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(DEFENDANTS' EXHIBIT M-C)

STATE OF MICHIGAN
DEPARTMENT OF COMMERCE
CORPORATION AND SECURITIES BUREAU

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, G. Ann Pitts, Certification Officer, Office of Franchise and Agent Licensing, Corporation and Securities Bureau, Michigan Department of Commerce, do hereby certify that a diligent search has been conducted for the franchise exemption notification request of the Burger King Corporation (File No. FE-75-14) pursuant to the Michigan Franchise Investment Law and that the Burger King Corporation had a Section 6(2)(a) exemption in effect for the period November 14, 1978 through November 14, 1979. A diligent search has been made for a notification of exemption pursuant to Section 6(2)(h) and Section 7 for the sale of the Burger King franchise to be located at 4983 Dixie Highway, Drayton Plains, Michigan, Store No. 775, to Brian MacShara and John Rudzewicz on June 4, 1979 and that no such records exist or are currently in the possession of the Corporation and Securities Bureau.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Corporation and Securities Bureau, Michigan Department of Commerce in the City of Lansing, this Twenty-First (21) day of December, 1981.

/s/ G. Ann Pitts
G. Ann Pitts, Acting Director
Office of Franchise and Agent Licensing

(Seal)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

COMPLAINT FOR DAMAGES

Plaintiff herein, BURGER KING CORPORATION, hereinafter referred to as "BKC", sues Defendants, Brian MacSHARA and JOHN RUDZEWICZ, hereinafter referred to as "franchisees" and alleges as follows:

ALLEGATIONS AS TO ALL COUNTS AND CLAIMS

1. This is an action for damages and other relief and jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1332, *Diversity of Citizenship*, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. This is an action for damages and other relief and jurisdiction of this Court is conferred pursuant to the Trademark Laws of the United States, 15 U.S.C. §1121 and pursuant to the Judicial Code of the United States, 28 U.S.C. §1338(a) and §1338(b).

3. At all times material, plaintiff, BKC, was and is a Florida corporation organized and existing pursuant to the laws of the State of Florida with its principal place of business in Miami, Dade County, Florida.

4. At all times material, defendant, BRIAN MacSHARA, was and is a citizen and resident of the State of Michigan and is subject to the jurisdiction of this Court, as hereinafter alleged.

5. At all times material, defendant, JOHN RUDZEWICZ, was and is a citizen and resident of the State of Michigan and is subject to the jurisdiction of this Court, as hereinafter alleged.

6. Venue is proper in this district court in that in addition to the fact that plaintiff is a corporation organized and existing pursuant to the laws of the State of Florida with its principal place of business in Miami, Dade County, Florida, the claims hereinafter alleged by plaintiff against defendants accrued within the Southern District of Florida in that the hereinafter referred to Franchise Agreement and Lease or Sublease Agreement was made and entered into in Miami, Dade County, Florida, and it is these agreements which give rise to plaintiff's rights which are enforceable in this Court. In particular, the hereinafter referred to Franchise Agreement and Lease or Sublease Agreement required payments to be made by defendants to plaintiff at plaintiff's place of business in Miami, Dade County, Florida, and each of the hereinafter referred to failures of the respective defendants to make such payments as will be hereinafter more fully set forth, constitutes a breach of contract within this district court. Furthermore, the defendants have had substantial contacts within this district in that the hereinafter referred to Franchise Agreement and Lease or Sublease Agreement were delivered by the defendants to the plaintiff at its offices in Miami, Dade County, Florida, and in addition, defendant, BRIAN MacSHARA, attended the Burger King University Operations Course which is located in Miami, Dade County, Florida, and as such, said substantial and significant contacts by the defendants in this district established this district as the district in which the hereinafter alleged claims arose pursuant to 28 U.S.C. §1391(b).

7. On or about February 14, 1979, plaintiff and defendants entered into a preliminary agreement with reference to the plaintiff furnishing and/or granting and the defendants acquiring a franchise for the operation of a Burger King restaurant. Attached hereto and made a

material part hereof as plaintiff's Exhibit No. 1 is a copy of said preliminary agreement dated February 14, 1979.

8. On or about June 4, 1979, plaintiff and defendant entered into a Burger King Restaurant Franchise Agreement at Miami, Dade County, Florida; the said Franchise Agreement from plaintiff to defendants granted the defendants a franchise and/or license for a period of twenty years to use the BURGER KING SYSTEM and the BURGER KING MARKS in the operation of a Burger King restaurant (franchised restaurant) located at 4983 Dixie Highway, Drayton Plains, Michigan; said Burger King restaurant being Burger King restaurant No. 775. Attached hereto and made a material part hereof as plaintiff's Exhibit No. 2 is a copy of the aforedescribed Franchise Agreement dated June 4, 1979.

9. On or about June 4, 1979, plaintiff and defendants entered into a Lease or Sublease Agreement with reference to the aforedescribed property. Attached hereto and made a material part hereof as plaintiff's Exhibit No. 3 is a copy of the aforedescribed Lease or Sublease Agreement dated June 4, 1979.

10. On or about June 4, 1979, the aforedescribed Burger King restaurant No. 775 opened for business at 4983 Dixie Highway, Drayton Plains, Michigan, pursuant to the aforedescribed June 4, 1979 Burger King Restaurant Franchise Agreement and Lease or Sublease Agreement.

11. Pursuant to the aforedescribed Burger King restaurant Franchise Agreement, provision No. 8A, defendants agreed to pay to plaintiff a royalty of 3.5% of gross sales for the use of the BURGER KING SYSTEM and the BURGER KING MARKS. Said royalties were to be paid monthly by the tenth (10th) day of each month based upon gross sales for the preceding month. In addition, pursuant

to provision No. 8B of the aforedescribed Franchise Agreement, defendants agreed to pay the plaintiff an amount equal to 4% of defendants' monthly gross sales by the tenth (10th) day of each month based upon the defendants' gross sales for the preceding calendar month for advertising, sales promotion, and public relations. In addition, pursuant to provision No. 13 of the aforedescribed Franchise Agreement, the defendants were required to pay when due, all taxes levied or assessed in connection with the possession, ownership or operation of the aforedescribed restaurant.

12. Pursuant to the aforedescribed Lease or Sublease Agreement dated June 4, 1979, Section 3.1, the defendants agreed to pay to the plaintiff as rent for each month a minimum monthly rent or 8 1/2% of that months gross sales, whichever amount is greater. The aforedescribed minimum monthly rent payment was to be paid by defendants to plaintiff in advance on the first (1st) day of each month. In addition, pursuant to Section 6.1 of the aforedescribed Lease or Sublease Agreement, defendants were to pay all taxes in connection with the ownership, occupancy or possession of the aforedescribed restaurant.

13. Defendants, in addition to the above required payments, additionally purchased certain materials, supplies, and other items from plaintiff and from plaintiff's Distron Division and from plaintiff's Davmor Division and obligated themselves to make payments to the plaintiff for said purchases. Said defendants have failed to pay for said purchases, as required.

14. As of May 1, 1981, defendants are in default of the aforedescribed provisions of the aforedescribed Franchise Agreement and Lease or Sublease Agreement and in the payment of the aforedescribed additional purchases

in the amount of $163,604.54, which is owed by defendants to plaintiff.

15. Plaintiff has performed all conditions precedent with reference to the bringing of this action including all notice provisions to the defendants, pursuant to the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement including, but not limited to:

(a) Letter dated January 8, 1980 to defendant MacSHARA with reference to the delinquent accounts payable;

(b) Letter dated January 23, 1980 to defendants with reference to their default pursuant to paragraph 16 of the aforedescribed Franchise Agreement and pursuant to Section 8.1 of the aforedescribed Lease or Sublease Agreement;

(c) Letter dated June 5, 1980 to defendants with reference to the aforedescribed defaults and termination of the aforedescribed Franchise Agreement and Lease or Sublease Agreement;

(d) Letter dated March 13, 1981 to defendants with reference to the aforedescribed defaults of the aforedescribed Franchise Agreement and Lease or Sublease Agreement;

(e) Letter dated April 20, 1981 to defendants with reference to the aforedescribed defaults of the aforedescribed Franchise Agreement and Lease or Sublease Agreement and with reference to the termination of the aforedescribed Franchise Agreement and Lease or Sublease Agreement and further, with reference to said defendants default pursuant to the aforedescribed Franchise Agreement and Lease or Sublease Agreement. Attached hereto and made a material part hereof as plaintiff's composite Exhibit No. 4 A-E are copies of the aforedescribed letters.

16. Despite the aforedescribed defaults by defendants of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, and despite the aforedescribed letters to defendants from plaintiff with reference to said defaults and with reference to said termination of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, said defendants continued to use and still continue to use the BURGER KING MARKS and the BURGER KING SYSTEM and continue to identify themselves as a BURGER KING franchise and publicly identify themselves as a BURGER KING franchise and continue to use BKC's trade secrets, operating procedures, promotional materials, and Marks. In addition, said defendants have failed to return to the plaintiff any and all manuals and/or materials containing trade secrets, restaurant operating instructions, or business practices of the plaintiff pursuant to the aforedescribed Franchise Agreement.

17. Despite the aforedescribed defaults and termination of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, the defendants have failed to remove themselves from the aforedescribed restaurant and premises and have failed to return control and possession of the aforedescribed restaurant and premises to the plaintiff, despite the plaintiff's demands that they do so.

COUNT I

CLAIM AGAINST DEFENDANTS FOR BREACH OF CONTRACT

18. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

19. As a result of the aforedescribed actions and conduct of the defendants, said defendants are in default

of the aforedescribed Franchise Agreement, provision No. 16, in all of the following respects:

(a) Defendants have failed to maintain and operate the restaurant in accordance with the standards and specifications established by the plaintiff as to service, cleanliness, health, and sanitation, knowingly selling their product which does not conform to plaintiff's specifications, failing to sell products designated by plaintiff, and selling products not approved by plaintiff;

(b) Defendants have failed to pay when due royalties and/or advertising and/or sales promotion and/or public relations contributions and/or for additional purchases from Distron and Davmor required to be paid under the agreement;

(c) By engaging in conduct which is dilitarious [sic] to or reflects unfavorably on both defendants and plaintiff;

(d) By the defendants' failure to maintain a responsible credit rating by failing to make prompt payment of undisputed bills, invoices and statements from suppliers of goods and services to said restaurant;

(e) By the defendants' repeated breaches of the aforedescribed provisions of the Franchise Agreement;

(f) By the defendants' failure to comply with the termination provisions of the aforedescribed Franchise Agreement pursuant to provision No. 16B.

20. As a result of the aforedescribed defaults of the provisions of the aforedescribed Franchise Agreement, said defendants have breached said Franchise Agreement with plaintiff.

21. As a result of the actions and conduct of the defendants, said defendants are in default of the afore-

described Lease or Sublease Agreement in the following respects:

(a) By the defendants' failure to pay the plaintiff the rent and/or other charges, as aforedescribed and alleged when they became due and payable;

(b) By said defendants failure to perform the obligations of the Lease or Sublease Agreement and such nonperformance continuing for a period within which performance was required to be made by specific provision of the Lease Agreement or for a period of thirty (30) days after notice thereof, as aforedescribed and alleged.

22. As a result of the aforedescribed defaults of the aforedescribed Lease or Sublease Agreement, the defendants have breached the aforedescribed Lease or Sublease Agreement with the plaintiff.

23. As a direct and proximate result of the defendants' breach of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, plaintiff has been damaged as aforedescribed and alleged, in an amount in excess of the minimal jurisdictional limit of this Court and said defendants are indebted to the plaintiff for said amounts.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, together with costs and interest thereon and demands trial by jury.

COUNT II

CLAIM AGAINST DEFENDANTS FOR INTEREST AND ATTORNEYS' FEES

24. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

25. Pursuant to provision No. 8D of the aforedescribed Franchise Agreement, plaintiff is entitled to the aforedescribed damages in addition to all costs, including attorneys' fees incurred as a result of this litigation and, in addition, plaintiff is entitled to interest at the maximum rate allowed by law for any royalty and advertising and sales promotion contribution not paid when due as aforedescribed and alleged.

26. Pursuant to provision and/or section 3.3 of the aforedescribed Lease or Sublease Agreement, plaintiff is entitled to the aforedescribed damages in addition to all costs and expenses, including reasonable attorney's fees and other legal and court costs.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally and demands attorneys' fees and costs, plus interest, and demands trial by jury.

COUNT III

CLAIM AGAINST DEFENDANTS FOR OPEN ACCOUNT

27. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

28. As of May 1, 1981, defendants owe plaintiff the sum of $163,604.54, plus interest, according to the attached account which is attached hereto and made a material part hereof as plaintiff's Exhibit No. 5.

29. In addition, subsequent to May 1, 1981, defendants will owe to plaintiff additional sums for royalty payments, advertising payments, real estate taxes, and monthly rentals, all of which said sums and amounts will be continuing in their nature.

WHEREFORE, plaintiff demands judgment for damages against the defendants, jointly and severally, together with costs and interest and demands trial by jury.

COUNT IV

CLAIM AGAINST DEFENDANTS FOR AN ACCOUNT STATED

30. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

31. Before the institution of this action, plaintiff and defendants had the aforedescribed business transactions between them and on or about April 20, 1981, said plaintiff and defendants agreed to a resulting balance as of April 1, 1981, in the amount of $155,523.54.

32. Plaintiff rendered a statement of said resulting balance to defendants and said defendants did not and have not objected to said statement.

33. Accordingly, defendants owe plaintiff the sum of $155,523.54 as of April 1, 1981, that is due plus interest, on said account.

34. As aforedescribed and alleged, as of May 1, 1981, defendants owe plaintiff the sum of $163,604.54, which is evidenced by plaintiff's Exhibit No. 5, plus interest on said account. As aforedescribed and alleged, said outstanding balance will increase subsequent to May 1, 1981, as the aforedescribed charges for royalties, advertising, real estate taxes, and monthly rental payments, are continuing in their nature.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, together with costs and interest and demands trial by jury.

COUNT V

CLAIM AGAINST DEFENDANTS FOR TRADEMARK INFRINGEMENT

35. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

36. Plaintiff, BURGER KING CORPORATION, is one of the world's largest restaurant organizations with more than 3,000 Burger King restaurants in the BURGER KING CORPORATION restaurant system.

37. Plaintiff's restaurants are located in all fifty (50) states within the United States and in several foreign countries. Many of the said restaurants are owned by plaintiff and many of said restaurants have been licensed or franchised to others, like the defendants herein, to operate.

38. In connection with this franchising, the right to use the BURGER KING CORPORATION trade names, trademarks, service marks, formula, designs, specifications, methods, trade secrets, marketing and advertising strategies and other property rights in the operation of BURGER KING restaurants is subject to and governed by the franchise agreements, like the Franchise Agreement entered into by and between the plaintiff and defendants in this cause and attached hereto as plaintiff's Exhibit No. 2.

39. Plaintiff has for many years invested substantial effort and money in developing original and distinctive features for use in its Burger King restaurants. These features include signs, symbols, colors, equipment and floor plan layouts of the premises, decorative accompaniments such as chairs, paper goods, unique employee uniforms utilizing distinctive red and gold colors and a limited menu featuring, among other things, hamburgers.

These features have been combined by plaintiff in its restaurants to create a distinctive business image. Plaintiff has spent hundreds of millions of dollars advertising and promoting the products and services of Burger King restaurants sold under its various trademarks and service marks. Through such advertising and promotion and through sales of quality products and services, plaintiff and its products and services have become widely known and favorably regarded by the purchasing and consuming public.

40. In addition to its valuable business image, plaintiff sells its products and services in the United States and in various foreign countries under various trademarks and service marks, including, but not limited to, the design mark comprising the words BURGER KING and the color red between two bun-halfs in the color gold. This mark (hereinafter referred to as the "bun-halfs logo") has been used by the plaintiff since at least as early as January, 1969, and is widely used and promoted by plaintiff in the advertising of its restaurants and the advertising and sale of its products and services. The bun-halfs logo has become a primary part of the plaintiff's business image.

41. In accordance with the provisions of federal law, plaintiff has registered the aforedescribed bun-halfs logo mark in the United States patent and trademark office and said registrations were duly and legally issued, and are valid and subsisting.

42. As aforedescribed and alleged, plaintiff and defendants entered into the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, which permitted the defendants to operate the aforedescribed Burger King restaurant No. 775 located in Drayton Plains, Michigan.

43. In the aforedescribed Burger King Restaurant Franchise Agreement attached hereto as plaintiff's Exhibit

No. 2, and dated June 4, 1979, defendants acknowledged in provision No. 10, that they had no part in the creation or development of plaintiff's trademarks, service marks and trade names, and they disclaimed any right or interest therein or to the goodwill derived therefrom, and said defendants warranted that they would not at any time question, dispute or attack the validity, right, title, or interest of the plaintiff as to its trademarks, service marks, trade names, patents and copyrights.

44. Pursuant to the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, said defendants agreed and acknowledged that upon termination of the aforedescribed franchise agreement, upon the occasion of a default, the following:

(a) The defendants' right to use, in any manner, the service marks and trademarks BURGER KING and HOME OF THE WHOPPER or any other mark registered by plaintiff or insignia or slogan used in connection therewith or any confusingly similar trademark, service mark, trade name or insignia would terminate forthwith;

(b) Said defendants would not directly or indirectly identify themselves in any manner as a present or former BURGER KING franchisee or use any of plaintiff's trade secrets, signs, symbols, devices, recipes, formulas, food mixes or other materials constituting a part of the BURGER KING SYSTEM;

(c) Defendants would immediately remove themselves from the aforedescribed restaurant and return control and possession of the aforedescribed restaurant to the plaintiff.

45. As aforedescribed and alleged, defendants have breached the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, by defaulting in the aforedescribed

payments due and owing to plaintiff from defendants and said defendants have thereby committed an act of default pursuant to provision No. 16(A) of the aforedescribed Franchise Agreement.

46. Pursuant to the aforedescribed provision No. 16(A) of the Franchise Agreement, entitled default and effect of termination, plaintiff has complied with all conditions precedent to said obligation by providing the defendants with written notice of said default and written notice of said termination as aforedescribed and alleged by the communications and letters which are attached hereto as plaintiff's composite Exhibit No. 4.

47. Provision No. 16(B), entitled effect of termination, of the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, provides that upon termination of the agreement by the occasion of a default, the franchisees right to use the BURGER KING MARKS and the BURGER KING SYSTEM shall terminate. In addition, the franchisees will not thereafter identify themselves as a BURGER KING franchisee or publicly identify themselves as a former BURGER KING franchisee or use any of the plaintiff's trade secrets, operating procedures, promotional materials, marks or any mark confusingly similar. In addition, upon termination, the franchisees would immediately return to the plaintiff the manuals loaned to them, together with all other material containing trade secrets, restaurant operating instructions, or the business practices of the plaintiff. In addition, the franchisees agreed to immediately remove themselves from the aforedescribed restaurant and return control and possession of the aforedescribed restaurant to the plaintiff.

48. Despite the aforedescribed notices of termination from plaintiff to defendants, as aforedescribed and alleged and as exhibited in plaintiff's composite Exhibit No. 4,

defendants have refused to discontinue their activities as a BURGER KING franchisee in violation of the aforedescribed Franchise Agreement and said defendants continue to use plaintiff's service marks, trademarks, and hold themselves out as operators of a BURGER KING licensed restaurant with a deliberate intent and design to trade upon the plaintiff's trademarks and service marks and the valuable goodwill attached thereto. Further, said defendants have refused to remove themselves from the aforedescribed restaurant and have refused to return control and possession of the aforedescribed restaurant to the plaintiff. In addition, defendants refuse to refrain from their continued use of plaintiff's BURGER KING SYSTEM involving symbols, devices, recipes, formulas, food mixes and other materials, all in violation of the aforedescribed franchise agreement and as a result, plaintiff has suffered and will continue to suffer irreparable injury and/or damage.

49. The continued operation by defendants of said restaurant which they represent to be a BURGER KING licensed restaurant, together with the sale of food products to the public pursuant to plaintiff's registered service marks and trademarks is likely to cause confusion and mistake and to deceive purchasers into believing that they are patronizing a BURGER KING licensed restaurant and buying plaintiff's approved products.

50. Defendants use of plaintiff's service marks and trademarks make it likely that a false and unfair association will be made between the plaintiff's goods and the defendants' goods in that purchasers are likely to believe that food products sold by the defendants are connected with or approved by plaintiff.

51. Defendants aforedescribed acts and conduct tend to reduce and dilute the value of plaintiff's goodwill and said conduct and acts are being committed with the intent

and for the purpose of appropriating and trading upon plaintiff's good will and reputation symbolized by the aforedescribed service marks and trademarks and with the intent and for the purpose of representing that defendants products are the products connected with or approved by the plaintiff.

52. Said defendants continued operation of the aforedescribed restaurant as a BURGER KING restaurant with the unauthorized use of the BURGER KING trademarks and service marks constitute an infringing use of and/or an infringement of those trademarks and service marks in violation of the common law rights and statutory rights of plaintiff, BURGER KING CORPORATION.

53. By reason of defendants aforedescribed conduct and acts, plaintiff has suffered serious injury and/or damages which is irreparable and said injury and/or damages will continue and increase, unless the defendants are enjoined from continuing said acts.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, for damages, including the defendants' profits, the plaintiff's damages, the costs of this action, plus interest, treble damages, and injunctive relief, and demands trial by jury.

DATED this 27 day of May, 1981.

PODHURST, ORSECK, PARKS,
JOSEFSBERG, EATON, MEADOW
& OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Attorneys for Plaintiff
By: /s/ Barry L. Meadow
Barry L. Meadow

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

MOTION FOR SUMMARY JUDGMENT AND/OR DISMISSAL AND/OR CHANGE OF VENUE PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, LACK OF SERVICE OF PROCESS, IMPROPER VENUE AND LACK OF JURISDICTION UNDER FEDERAL RULE 12(b)

Request for Oral Argument

NOW COMES the above named defendant, JOHN RUDZEWICZ, Only, by and through his attorneys, OEHMKE LEGAL ASSOCIATES and hereby moves this Court as follows:

1. To dismiss the above stated cause of action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the above stated action or in lieu thereof to quash the return of service of summons on the grounds:

a. That the defendant JOHN RUDZEWICZ is a named resident of the State of Michigan and was not and is not subject to service of process within the Southern District of Florida, and;

b. That the defendant JOHN RUDZEWICZ, has not been properly served with process in this action, all of which more clearly appears in the affidavit of the defendant, JOHN RUDZEWICZ annexed hereto as Exhibit A.

3. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this court is envoked, in part, on the basis of diversity and "long-arm" statute and;

b. The defendant was not present or domiciled in the State of Florida at the time when the purported service of process was made, and;

c. The claim did not arise within this District as is evident from the face of plaintiffs' Complaint and JOHN RUDZEWICZ's Affidavit, annexed hereto as Exhibit A.

4. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this Court is envoked, in part, on the allegation that this case involves a Federal Question;

b. That venue over this matter is controlled by Title 28, Sec. 1391 which provides, in part, that a Civil Action which is not founded solely on diversity of citizenship can be brought only in the Judicial District where all defendants reside, or in which the claim arose.

5. To dismiss the action on the grounds that the court lacks jurisdiction under Rule 4(e) and (f) of the Federal Rules of Civil Procedure.

This motion is based on the records and files in the entitled cause, and is supported by a brief attached hereto.

Defendant's attorney has requested that plaintiffs' attorney dismiss the above captioned complaint but has been refused.

OEHMKE LEGAL ASSOCIATES
/s/ Thomas H. Oehmke
Thomas H. Oehmke (P22963)

Dated: 22 June 1981

REQUEST FOR ORAL ARGUMENT

NOW COMES Thomas H. Oehmke, Attorney for Defendant JOHN RUDZEWICZ, and makes a request for an opportunity to make an oral argument on his Motion for Summary Judgment and/or Dismissal and/or Change of Venue Presenting Defenses of Failure to State a Claim, Lack of Service of Process, Improper Venue and Lack of Jurisdiction Under Federal Rule 12(b) because of the complicated issues presented, the sweeping and incorrect allegations of fact—wrongly made in the Complaint—which form the basis for Florida jurisdiction, and the serious economic consequences for Defendant, a Michigan resident, to defend himself in a Florida lawsuit.

/s/ Thomas H. Oehmke
Thomas H. Oehmke (P22963)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

ORDER

This matter is before the Court on the motion of Defendants' for Summary Judgment, etc., The motion has been fully briefed by both sides.

The Court has examined the briefs filed in support of the motion and filed in opposition to it and has determined that a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements. It has also been held that venue in the Southern District of Florida is proper in such actions. Numerous recent cases in this Court supply

authority for the foregoing propositions. See *Burger King Corporation v. David M. Elliott,* Case No. 80-2694-Civ-EBD; *Burger King Corporation v. Gary L. Wagner,* Case No. 80-942-Civ-EBD; *Burger King Corporation v. Paul D. Snow, Jr., et al.,* 80-295-Civ-SMA; *Burger King Corporation v. Blanchard W. Robinson and Utopia Systems, Inc.,* Case No. 79-5824-Civ-EPS; *Burger King Corporation v. Gerald A. Mason, et al.,* Case No. 78-2932-Civ-EBD.

The Court considers the Defendants' remaining argument to be without merit. Accordingly, it is

ORDERED AND ADJUDGED that the motion for summary judgment, etc., is DENIED. Defendants shall have twenty (20) days from the date hereof in which to file their Answer to the Complaint. It is further

ORDERED AND ADJUDGED that the Court will defer ruling on Plaintiff's motion for preliminary injunction until final hearing. This cause will be accelerated and set for final hearing by separate order after an answer has been received. The parties should anticipate that this cause will be set for final hearing before the end of this year.

DONE AND ORDERED in chambers at Miami, Florida, this 20th day of August, 1981.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

CC: Barry L. Meadow, Esquire
Paul W. Harty, Esquire
Thomas H. Oehmke, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

(Filed September 24, 1981)

ANSWER TO COMPLAINT

NOW COMES one of the Defendants herein, namely JOHN RUDZEWICZ, by and through his attorneys, OEHMKE LEGAL ASSOCIATES, and answers Plaintiff's Complaint as follows:

1. Answering Paragraph 1, this Defendant denies jurisdiction, but admits the controversy exceeds Ten Thousand and no/100 ($10,000.00) Dollars.

2. Answering Paragraph 2, this Defendant denies the jurisdiction grounds.

3. Answering Paragraph 3, this Defendant neither admits nor denies the same and leaves the Plaintiff to its proof thereof.

4. Paragraph 4 is not applicable to this Defendant.

5. Answering Paragraph 5, this Defendant admits he is a citizen and resident of the State of Michigan, but denies he is subject to jurisdiction of this Honorable Court except as ordered by this Court.

6. Answering Paragraph 6, this Defendant denies the same.

7. Answering Paragraph 7, this Defendant admits signing Exhibit "1" in Michigan.

8. Answering Paragraph 8, this Defendant admits signing the Franchise Agreement, but in the State of Michigan.

9. Answering Paragraph 9, this Defendant admits signing the Lease, but the same was signed and executed in the State of Michigan.

10. Answering Paragraph 10, this Defendant admits the same, except it opened and operated under the corporate name of RMBK Corp., a Michigan corporation.

11. Answering Paragraph 11, this Defendant states that the Franchise Agreement speaks for itself, but it was entered into under false representations.

12. Answering Paragraph 12, this Defendant states that the Lease or Sublease Agreement speaks for itself, but it was entered into under false representations.

13. Answering Paragraph 13, this Defendant denies the same and says that all purchases were made to RMBK Corp., a Michigan corporation, and that it is the owner of the restaurant.

14. Answering Paragraph 14, this Defendant denies the same.

15. Answering Paragraph 15, this Defendant denies the same and states the Plaintiff knew that the business was being operated by RMBK Corp., & all moneys paid to Plaintiff were paid by RMBK Corp. on checks with the corporate name imprinted thereon.

16. Answering Paragraph 16, this Defendant admits the restaurant is being operated by RMBK Corp.

17. Answering Paragraph 17, this Defendant admits the restaurant is being operated by RMBK Corp.

18. Answering Paragraph 18, Defendant Rudzewicz adopts and incorporates by reference his answers to Paragraphs 1 through 17.

19. In reply to Paragraph 19, subparagraphs (a) through (f), Defendant Rudzewicz denies the same..

20. Answering Paragraph 20, this Defendant denies the same.

21. Answering Paragraph 21, this Defendant denies the same.

22. Answering Paragraph 22, this Defendant denies the same.

23. Answering Paragraph 23, this Defendant denies the same.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

COUNT II

24. Answering Paragraph 24, Defendant Rudzewicz adopts and incorporates by reference his answers to Count I, Paragraphs 1 through 23.

25. Answering Paragraph 25, this Defendant denies these conclusions.

26. Answering Paragraph 26, this Defendant denies these conclusions.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

COUNT III

27. Answering Paragraph 27, Defendant Rudzewicz adopts and incorporates by reference his answers to Counts I and II, specifically Paragraphs 1 through 26.

28. Answering Paragraph 28, this Defendant denies the same.

29. Answering Paragraph 29, this Defendant denies the same.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

30. Answering Paragraph 30, Defendant Rudzewicz adopts and incorporates by reference his answers to Counts I, II and III, specifically Paragraphs 1 through 29.

31. Answering Paragraph 31, this Defendant denies the same.

32. Answering Paragraph 32, this Defendant denies that they have not objected.

33. Answering Paragraph 33, this Defendant denies the same.

34. Answering Paragraph 34, this Defendant denies the same.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

COUNT V

35. Answering Paragraph 35, Defendant Rudzewicz adopts and incorporates by reference his answers to Counts I, II, III and IV, specifically Paragraphs 1 through 34.

36. Answering Paragraph 36, this Defendant admits the same.

37. Answering Paragraph 37, this Defendant neither admits nor denies the same, but leaves Plaintiff to its proof thereof.

38. Answering Paragraph 38, this Defendant denies the same for all sales are being made to RMBK Corp. and

are being made and paid for by RMBK Corp. on a cash basis for a long period of time.

39. In reply to Paragraph 39, this Defendant does not know what the Plaintiff has done for others, but has done very little, if anything for this Defendant.

40. Answering Paragraph 40, all sales of Plaintiff's exclusive products have been made to RMBK Corp. only and for a long period of time on a cash basis.

41. Answering Paragraph 41, this Defendant neither admits nor denies the same and leaves the Plaintiff to its proof thereof.

42. Answering Paragraph 42, this Defendant is not operating Restaurant 775, but RMBK Corp. as all records of the State of Michigan and the Internal Revenue Service will show.

43. Answering Paragraph 43, this Defendant states that the Exhibit speaks for itself, but the real party in interest is RMBK Corp. who has acquired certain rights since taking over the operation of the Burger King Restaurant located in Drayton Plains, Michigan.

44. Answering Paragraph 44, this Defendant states that the Plaintiff knew that the Defendants were turning the operation of the restaurant to a Michigan corporation known as RMBK Corp. before opening and Plaintiff knows that the corporation has been operating the restaurant for all checks, all payments were made by RMBK and RMBK Corp. is still buying food on a cash basis from a division of Plaintiff.

45. Answering Paragraph 45, this Defendant denies the same.

46. Answering Paragraph 46, this Defendant denies the same and states that no notice of any kind has been given to RMBK Corp.

47. Answering Paragraph 47, this Defendant states that it is the Plaintiff's obligation to prove the legal rights of the Plaintiff and further answering said paragraph, this defendant states that the restaurant is being operated by an employee of RMBK Corp.

48. Answering Paragraph 48, this Defendant states that the Plaintiff still continues to sell its food and supplies to RMBK Corp.

49. Answering Paragraph 49, this Defendant denies the same for all products being sold are purchased for Plaintiff.

50. Answering Paragraph 50, this Defendant denies the same and states that all food sold by RMBK Corp. is approved by the Plaintiff and sold by it to RMBK Corp.

51. Answering Paragraph 51, this Defendant denies the same.

52. Answering Paragraph 52, this Defendant denies the same and states that the restaurant is being operated by RMBK Corp.

53. Answering Paragraph 53, this Defendant denies the same.

WHEREFORE, this Defendant prays that this Complaint be dismissed with costs so wrongfully sustained.

OEHMKE LEGAL ASSOCIATES
By: /s/ Thomas H. Oehmke
THOMAS H. OEHMKE,
Attorney

Dated: September 15, 1981

AFFIRMATIVE DEFENSE

NOW COMES one of the defendants herein, namely JOHN RUDZEWICZ, by and through his attorneys, OEHMKE LEGAL ASSOCIATES, and by way of affirmative defenses states:

1. That Defendant RUDZEWICZ, preserves the right to add to its answer and to rely upon all affirmative defenses as may be hereafter disclosed by way of discovery.

OEHMKE LEGAL ASSOCIATES
By: /s/ Thomas H. Oehmke
THOMAS H. OEHMKE,
Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

DEFENDANT RUDZEWICZ'S COUNTERCLAIM

NOW COMES John J. Rudzewicz, by counsel, and in support of its Counterclaim (under FRCP 13(a) and 13(f)), says:

JURISDICTION

1. That John J. Rudzewicz is an individual and resident of the County of Oakland, State of Michigan and that all transactions this Counterclaim and Cross-Claim arise out of the transaction or occurrence that is the subject matter of the original complaint filed herein.

2. That Burger King Corporation (called "BKC" hereinafter) is a Florida Corporation doing business in the County of Oakland, State of Michigan, where Store #775,

the subject of the Complaint herein, is located and does business.

3. That the Counterclaim against BKC is a compulsory counterclaim (brought under FRCP 13(a) which may have been an omitted counterclaim (under FRCP 13(f)).

FRANCHISE AGREEMENTS

4. That BKC made an offer or sale of a franchise (as defined in MCL 445.1502(3) and called "franchise" hereinafter) to Defendants Rudzewicz and Brian MacShara in the State of Michigan. (See MCL 445.1404(2).)

5. That franchisees Rudzewicz, Brian MacShara, and RMBK Corp. (called "franchisees" hereinafter) are domiciled in the State of Michigan and the franchise for Store #775 was to be, is, and has always been, operated in the State of Michigan. (See MCL 445.1404(2).)

6. That the offer to sell the franchise by BKC to the franchisees originated in the State of Michigan and received by franchisees in the State of Michigan. (See MCL 445.1404(3).)

7. That the offer to sell by BKC was directed by BKC to franchisees in the State of Michigan and received by franchisees in the State of Michigan. (See MCL 445.1404(3).)

8. That the offer to sell the franchise was accepted in the State of Michigan by franchisees and acceptance of such offer was communicated to BKC in the State of Michigan. (See MCL 445.1404(3).)

9. That the acceptance by the franchisees was communicated to BKC in the State of Michigan (as it was directed to the BKC Southfield, Michigan office in the State of Michigan) where franchisees reasonably believed

BKC to be located and such acceptance was received by BKC in Drayton Plains, Michigan.

10. That the franchise which is the subject of this Complaint is subject to the Michigan Franchise Investment Law, being MCL 445.1501 *et seq.*

PROHIBITED ACTS

11. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC employed a device, scheme, or artifice to defraud Franchisees by systematically conducting a series of interviews with BKC personnel at its Southfield, Michigan office who, individually and collectively, deluged franchisees with oral and written information designed to induce franchisees to execute the franchise agreements, even though it was a financially inadvisable venture, upon which franchisees relied to their detriment and which induced them to enter into the franchise agreement(s), all contrary to MCL 445.1505(1)(a).

12. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC made one or more untrue statements of a material fact, which franchisees relied upon to their detriment and which induced them to enter into the franchise aggreement(s), all contrary to MCL 445.1505(1)(b).

13. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC omitted to state one or more material facts necessary in order to make the statement(s) made not misleading, (in light of all the circumstances under which they are made), upon which franchisees relied to their detriment and which induced them to enter into the franchise agreement(s), all contrary to MCL 445.1505(1)(b).

14. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC engaged in an act, practice, or course of business which operated as a fraud or deceit upon franchisees, and upon which franchisees relied to their detriment and which induced them to enter into the franchisee agreement(s), all contrary to MCL 445.1505(c).

15. That the franchise agreement(s) into which franchisees entered were subject to registration under the Michigan Franchise Investment Law, being MCL 445.1501 et seq.

16. That such franchise agreement(s) were sold by BKC to franchisees without first providing to such prospective franchisees a copy of of the prospectus, together with a copy of all proposed agreements relating to the sale of the franchise, at least one week prior to the execution by the prospective franchisees the binding franchise agreement or other agreement(s), all contrary to MCL 445.1516.

17. That such franchise agreement(s) were sold by BKC to franchisees without first providing to such prospective franchisees a copy of the prospectus, together with a copy of all proposed agreements relating to the sale of the franchise, at least one week prior to the receipt of any consideration from franchisees, all contrary to MCL 445.1516.

18. That the franchise offered to franchisees in the State of Michigan was not registered as required by the Michigan Franchise Investment Law, contrary to MCL 445.1506(1).

RELIEF

19. That the Michigan Franchise Investment Law provides that a person who offers or sells a franchise in

violation of sections 5(1), 6 or 16 is liable to the person purchasing the franchise for damages or recission, with interest at 6% per year from the date of purchase and reasonable attorney fees and court costs. (See MCL 445.1531(1).)

20. That in a proceeding under the Michigan Franchise Investment Law, damages may be based on reasonable approximations, but not on speculation. (See MCL 445.1531(3).)

WHEREFORE, Counterclaimant John J. Rudzewicz prays that with respect to BKC only, this Honorable Court will:

(A) Rescind the agreement(s) with BKC, and

(B) Award damages (including refund of the franchise fee) based on reasonable approximations, with interest at 6% per year from the date of purchase, and

(C) Award reasonable attorney fees, and

(D) Award Court costs.

OEHMKE LEGAL ASSOCIATES
/s/ By Thomas H. Oehmke
Thomas H. Oehmke
Attorney for Defendant John J. Rudzewicz *only*

Dated: 30 November 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

COUNTERDEFENDANT, BURGER KING CORPORATION'S ANSWER TO COUNTERPLAINTIFF, RUDZEWICZ'S COUNTERCLAIM

PLAINTIFF/COUNTERDEFENDANT, BURGER KING CORPORATION, herein files this Answer to the Counterclaim filed on behalf of Defendant/CounterPlaintiff, JOHN RUDZEWICZ, as follows:

1. CounterDefendant admits the allegation of Paragraph 2.

2. CounterDefendant denies the allegations of Paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20.

WHEREFORE, CounterDefendant requests that the Counterclaim filed herein be dismissed.

(Jurat omitted in printing)

PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Attorneys for Plaintiff
1201 City National Bank Bldg.
Miami, FL 33131
358-2800
By: /s/ Barry L. Meadow
Barry L. Meadow

(Filed March 3, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

vs.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER THEREON

THIS CAUSE came on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, pursuant to Defendant, BRIAN MacSHARA's Waiver of Jury Demand dated January 29, 1982, pursuant to Defendant JOHN RUDZEWICZ's, Waiver of Jury Demand dated January 20, 1982, and pursuant to Plaintiff, BURGER KING CORPORATION's, Waiver of Jury Demand pursuant to Rule 39(a) of the Federal Rules of Civil Procedure announced on the record at the trial of this cause which commenced on February 2, 1982. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This Court makes the following findings of fact:

1. That Plaintiff, BURGER KING CORPORATION, is a Florida corporation with its principal place of business located in Miami, Dade County, Florida.

2. That Defendant, JOHN RUDZEWICZ, is a citizen and resident of the State of Michigan.

3. That Defendant, BRIAN MacSHARA, is a citizen and resident of the State of Michigan.

4. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

5. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

6. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

7. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

8. That the above-described Franchise Agreement and Lease or Sub-Lease Agreement pertain to Burger King Restaurant Number 775 located at 4983 Dixie Highway, Drayton Plains, Michigan.

9. That Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, signed and entered into the above-described Franchise Agreement and Lease or Sub-Lease Agreement in their individual capacities.

10. That pursuant to Paragraph 8A of the above-described Franchise Agreement, franchise royalties were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

11. That pursuant to Paragraph 13 of the above-described Franchise Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

12. That pursuant to Section 3.1 of the above-described Lease or Sub-Lease Agreement, rental payments were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

13. That pursuant to Section 6.1 of the above-described Lease or Sub-Lease Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

14. That there was an agreement between the parties that all payments by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, for all supplies and other materials ordered by said Defendants from Plaintiff's DAVMOR DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

15. That there was an agreement between the parties that all supplies and other materials ordered by said Defendants from Plaintiff's DISTRON DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

16. That pursuant to Paragraph 8B of the above-described Franchise Agreement, advertising fees were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

17. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Forty-Four Thousand, Five Hundred Sixty-Seven Dollars and Seventy-Three Cents ($44,567.73), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8A of the Franchise Agreement for franchise royalties.

18. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Thirty-Four Thousand, Five Hundred One Dollars and Thirty-Six Cents ($34,501.36), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8B of the Franchise Agreement for advertising.

19. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ, and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of One Hundred-Eleven Thousand, Seven Hundred-Ten Dollars and Sixty Cents ($111,710.60), which is due and owing to BURGER KING CORPORATION pursuant to Section 3.1 of the Lease or Sub-Lease Agreement for rent.

20. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to reimburse BURGER KING CORPORATION the sum of Eleven Thousand, Seventy-Six Dollars and Forty-Four Cents ($11,076.44), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 13 of the

Franchise Agreement and pursuant to Section 6.1 of the Lease or Sub-Lease Agreement for taxes.

21. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Six Thousand, Twenty-Six Dollars and Eighty Cents ($6,026.80), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DAVMOR DIVISION.

22. That as of January 15, 1982, the Defendants JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Twenty Thousand, Nine Hundred Ninety-Two Dollars and Forty-Seven Cents ($20,992.47), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DISTRON DIVISION.

23. That as of January 15, 1982, Deefndants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe to Plaintiff, BURGER KING CORPORATION, the total sum of Two Hundred Twenty-Eight Thousand, Eight Hundred Seventy-Five Dollars and Forty Cents ($228,875.40).

24. That Plaintiff, BURGER KING CORPORATION, mailed to the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, and the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, received the appropriate Notice of Default letters, Default letters, and Termination of Franchise letters pursuant to the provisions of Paragraph 16 of the above-described Franchise Agreement and pursuant to the provisions of Section 8.1 of the above-described Lease or Sub-Lease Agreement.

25. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, make any material statements of fact to the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, which were false.

26. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, represent or give the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, false figures pertaining to the past gross-sales history of Burger King Restaurant Number 775 or false figures pertaining to the projected or estimated future gross-sales of Burger King Restaurant Number 775.

27. That any statements of fact made by Plaintiff, BURGER KING CORPORATION, and its agents, servants or employees, to Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, pertaining to gross-sales figures for Burger King Restaurant Number 775, either in the past or to be expected in the future, were joined and merged into the above-described Franchise Agreement and said Franchise Agreement, pursuant to Paragraph G, Introduction, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

28. That at all times during the transactions between the Defendants, JOHN RUDEZWICZ and/or BRIAN MacSHARA, and the Plaintiff, BURGER KING CORPORA-

TION, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, were and are experienced and sophisticated businessmen and at no time were the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, acting under economic duress or disadvantage imposed by the Plaintiff, BURGER KING CORPORATION.

29. That the cause of the low gross-sales volume of Burger King Restaurant Number 775 located in Drayton Plains, Michigan, was and is due to additional competition and the prevailing economic conditions in the surrounding area of said restaurant.

30. That Paragraph 14 of the Franchise Agreement and Section 12.2 of the Lease or Sub-Lease Agreement prohibited assignment of the Franchise Agreement and/or the Lease or Sub-Lease Agreement without the written consent and approval of Plaintiff, BURGER KING CORPORATION.

31. That the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, never requested and the Plaintiff, BURGER KING CORPORATION, never consented, in writing, to the assignment and/or the purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation.

32. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, had in their possession copies of the Burger King Corporation Uniform Franchise Offering Circular approximately four and one-half months prior to their execution of the above-described Franchise Agreement and Lease or Sub-Lease Agreement and that said circular contained copies of the Franchise Agreement and Lease or Sub-Lease Agreement.

33. That Plaintiff, BURGER KING CORPORATION, did not violate the laws of the State of Michigan pertaining to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, assuming, without deciding, that BURGER KING CORPORATION is subject to those laws.

34. That, at the present time, neither Defendant, JOHN RUDZEWICZ or BRIAN MacSHARA, is managing or operating Burger King Restaurant Number 775 on a full-time, day to day basis, in violation of Paragraph 3 of the Franchise Agreement.

35. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, having continued to use the BURGER KING CORPORATION trademarks, tradenames, service marks, methods, and logos, in violation of the above-described Franchise Agreement after proper termination of said Franchise Agreement by Plaintiff, BURGER KING CORPORATION.

36. That it is in the best interests of the consuming public that, at the Plaintiff, BURGER KING CORPORATION's election, either the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, immediately close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to Plaintiff, BURGER KING CORPORATION, for their continued operation of said Burger King Restaurant Number 775.

CONCLUSIONS OF LAW

This Court concludes, as a matter of law, the following:

A. That this Court has jurisdiction over the subject matter and the parties to this cause.

B. That said Franchise Agreement and Lease or Sub-Lease Agreement executed by Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, on June 4, 1979, have been properly terminated by Plaintiff, BURGER KING CORPORATION.

C. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for breach of the Franchise Agreement and Lease or Sub-Lease Agreement, and Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have breached the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979.

D. That as a direct and proximate result of the breach of the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979, by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

E. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for an Open Account.

F. That as a result of the action proven for an Open Account, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

G. That Plaintiff, BURGER KING CORPORATION, has failed to prove the necessary elements of an action for an Account Stated.

H. That said Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are jointly and severally liable to Plaintiff, BURGER KING CORPORATION, for the above-stated amounts found due and owing to Plaintiff, BURGER KING CORPORATION, in their individual capacities.

I. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove any of the required elements of an action for fraud, misrepresentation, or deceit.

J. That the Franchise Agreement and Lease or Sub-Lease Agreement executed by and between the parties on June 4, 1979, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

K. That any assignment and/or purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation is void as it may pertain to this transaction between the parties and as it may pertain to any amounts found herein to be due and owing to Plaintiff, BURGER KING CORPORATION, from the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA.

L. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their affirmative defenses and in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove that BURGER KING CORPORATION violated the laws of the State of Michigan pertaining to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, as-

suming, without deciding, that BURGER KING CORPORATION is subject to those laws.

M. That the Defendants, JOHN RUDZEWICZ's and BRIAN MacSHARA's, unauthorized continued use of the BURGER KING CORPORATION trademarks, tradenames, service marks, methods and logos, after proper termination of the Franchise Agreement by the Plaintiff, BURGER KING CORPORATION, constitutes an infringing use of and/or infringement of those properties in violation of the common law rights and statutory rights of the Plaintiff, BURGER KING CORPORATION.

N. That irreparable harm may result to the Plaintiff, BURGER KING CORPORATION, if the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, continue to infringe upon BURGER KING CORPORATION's above-described property rights and at Plaintiff, BURGER KING CORPORATION's, election, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, shall either close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED, as follows:

1. Plaintiff shall submit a Final Judgment, in conformity with these Findings of Fact and Conclusions of Law, within three (3) days of the date of entry of this Order.

2. This Court further reserves jurisdiction of this cause with reference to determining and/or assessing attorneys fees and costs, upon appropriate motion.

3. Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are, at the election of Plaintiff, BURGER KING CORPORATION, hereby ordered to immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

4. This Court further reserves jurisdiction of this cause with reference to the enforcement of, and/or the compliance with, the provisions of Paragraph 3 above.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 3 day of March, 1982.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

Copies furnished to:

BARRY L. MEADOW, ESQ.
PAUL H. HARTY, ESQ.
THOMAS H. OEMHKE, ESQ.
RICARDO CATA, ESQ.

(Filed March 5, 1982)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

v.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINAL JUDGMENT

THIS CAUSE having come on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, and this Court having entered its Findings of Fact and Conclusions of Law and Order thereon, dated March 3, 1982, and being otherwise fully advised in the premises, it is accordingly

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered in favor of Plaintiff, BURGER KING CORPORATION and against the Defendants, BRIAN MacSHARA and JOHN RUDZEWICZ, jointly and severally, in the amount of TWO HUNDRED TWENTY-EIGHT THOUSAND EIGHT HUNDRED SEVENTY FIVE DOLLARS AND FORTY CENTS ($228,875.40) for all of which sum let execution issue. Attorneys fees and costs shall be hereinafter taxed.

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered on the Counterclaims filed herein by Defendants/Counterclaimants, in favor of Counterdefendant, BURGER KING CORPORATION, and against Counterclaimants, BRIAN MacSHARA and JOHN

RUDZEWICZ, who shall take nothing by said Counterclaims.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida on this 5th day of March, 1982.

/s/ James W. Kehoe
U.S. DISTRICT COURT
JUDGE

cc: Barry L. Meadow, Esquire
Ricardo Cata, Esquire
Paul Harty, Esquire
Thomas H. Oehmke, Esquire

BURGER KING CORPORATION, a Florida Corporation,
Plaintiff-Appellee,

v.

Brian MacSHARA, Defendant,
John Rudzewicz, Defendant-Appellant.

No. 82-5424.

United States Court of Appeals,
Eleventh Circuit.

Feb. 13, 1984.

Franchisee appealed from judgment of the United States District Court for the Southern District of Florida, James W. Kehoe, J., awarding franchisor damages of $228,875.40 as well as costs of $2,151.06 and attorney fees of $30,000, in franchisor's breach of contract and trademark infringement action. The Court of Appeals, Vance, Circuit Judge, held that even though franchisee's activities fell within reach of Florida's long-arm statute, invocation of statute offended fundmental fairness which was touchstone of due process.

Reversed and remanded.

Johnson, Circuit Judge, filed dissenting opinion.

1. Constitutional Law (Key) 305(4)
Federal Courts (Key) 373

In diversity case, federal district court must exercise its jurisdiction in accordance with due process and law of state in which court sits. U.S.C.A. Const.Amend. 5.

2. Courts (Key) 12(2)

No defendant can be compelled to answer in state's courts unless minimum contacts exist between defendant,

forum state and litigation such that maintenance of suit does not offend traditional notion of fair play and substantial justice.

3. Constitutional Law (Key) 305(5)

In deference to sovereignty of forum's sister states, due process requires that there be some act by which defendant purposely avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws. U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law (Key) 305(4)

Due process restrictions on jurisdiction of courts are more than guaranty of immunity from inconvenient or distant litigation; they are consequence of territorial limitations on power of respective states. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law (Key) 305(5)

State cannot justifiably assert jurisdiction over individual with whom it has no constitutionally cognizable contacts or ties.

6. Constitutional Law (Key) 305(5)

Although franchisee's activities fell within reach of Florida long-arm statute, invocation of statute offended fundamental fairness which is touchstone of due process, where only face-to-face contacts franchisee had with franchisor throughout months of protracted negotiations were with representatives of franchisor's Michigan office, franchisee maintained no staff in state of Florida, contracts contemplated start of Michigan restaurant whose profits would derive solely from food sales made to customers

in Michigan, local Michigan office was responsible for providing all the services due franchisee, and franchisee was financially unprepared to meet costs of suit in Florida. West's F.S.A. § 48.193(1)(g); U.S.C.A. Const.Amends. 5, 14.

Thomas H. Oehmke, Oehmke & Richardson, Detroit, Mich., for defendant-appellant.

Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Joel S. Perwin, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

VANCE, Circuit Judge:

In 1979, with the economy poised on the brink of recession, John Rudzewicz and Brian MacShara decided to purchase a Burger King restaurant franchise near Detroit, Michigan. This appeal, filed by Rudzewicz,[1] is the unforeseen outcome of their ill-timed venture.

Rudzewicz, a senior partner in a Michigan accounting firm, agreed to secure investment capital while MacShara was to handle day-to-day operations. MacShara's experience included stints as a supervisor in his father's Michigan construction firm and as a onetime assistant at a Burger King restaurant. Both were and are residents and citizens of the state of Michigan.

The Burger King Corporation is incorporated in Florida and headquartered in Miami. The company maintains a

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

1. MacShara has not appealed his judgment.

district office in Birmingham, Michigan. During the course of negotiations, which lasted five months, the Michigan district office was Burger King's sole representative in dealings with Rudzewicz and MacShara. H.G. Hoffman, the Michigan district manager, evaluated their proposal and wrote them on the company's behalf to convey approval of their franchise application. Following lengthy discussions, Hoffman persuaded them to acquire an existing store in Drayton Plains, Michigan to avoid the higher rent that would be entailed if they insisted upon construction of a new building. He also convinced them to purchase and install $165,000 worth of equipment before the final rental charge had been computed.

At the conclusion of each round of Michigan negotiations, the Miami office mailed Rudzewicz printed documents for his signature. The documents, once signed, were returned to Burger King headquarters in Miami for completion.[2] Following corporate approval, headquarters then mailed Rudzewicz copies of the completed documents for his files.

After granting initial approval, Burger King decided to schedule the grand opening for May 31, 1979, the close of its fiscal year, to ensure that the sale appeared in the company's year-end statement. On May 29, the day the final agreements arrived for signature, Rudzewicz and MacShara finally learned what rent Burger King expected them to pay. The figure was far in excess of the amount Rudzewicz had projected.[3] He telephoned Hoffman and demanded a lower figure. According to Rudzewicz, Hoffman replied that the rent computation was out of his

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2. The record does not identify who mailed the papers to Miami.

3. *See infra* note 4.

hands. If Rudzewicz was unwilling to accept the figure Burger King proposed, Hoffman continued, he was always free to decline the franchise, rip out the fixtures he had installed at his own expense, and resell them at a loss. On June 4 Rudzewicz and MacShara signed the lease and franchise agreements in their individual capacities at a Michigan closing ceremony attended by employees of the local district office.

In the lease agreement, Burger King agreed to lease the Drayton Plains store for a term of twenty years. Rent was set at a monthly minimum of $4,166.66 in the first two years and $5,286.58 thereafter or 8½% of monthly gross sales, whichever was greater.[4] The franchisees were required to remit rent, as well as royalties, tax refunds and other designated fees to Burger King headquarters in Miami.[5]

In return Burger King promised use of the Burger King mark, architectural advice, advertising services, financial counseling, and operations consultation. At trial, an executive from the Miami headquarters office testified that the Michigan district office was administratively responsible for all of the supervision, advertising and consul-

4. The lease called for minimum annual rent consisting of 13.4% of "construction costs." At trial, Rudzewicz testified that Michigan Burger King officials estimated construction costs would equal approximately $180,000. This figure was based on the costs of renovating the existing Drayton Plains facility.

Rent calculated on a base of $180,000 would equal $2,010 a month. Rudzewicz boosted his projection to $2,500 to amortize the additional cost of original construction. Although he testified that Hoffman promised that the rent at Drayton Plains would be lower than that at a new facility, the rent that Burger King finally proposed was computed on a base equal to that estimated for newly constructed facilities. This testimony stands undisputed and uncontradicted.

5. Rudzewicz and MacShara signed equipment contracts containing similar provisions with the Davmore division of Burger King.

tation due under the contract. With the exception of a Burger King University management course which MacShara attended in Florida and the Miami payment obligation, the contracts provided for no contact of any kind between the Florida headquarters and the franchisees.

Within weeks of opening, the store had fallen behind in payments. Rescheduling negotiations broke down, and Burger King sued Rudzewicz and MacShara in diversity in the Southern District of Florida for breach of contract and trademark infringement. Defendants entered a special appearance to contest personal jurisdiction. After losing this motion, they filed a counterclaim seeking damages under the Michigan Franchise Investment Act.[6] A bench trial ensued and Judge Kehoe entered judgment for Burger King on both the contract claim and the counterclaim. Damages of $228,875.40 were assessed against defendants in their individual capacities. In addition, Burger King was awarded costs of $2,151.06 and $30,000 in attorneys fees.

On appeal, Rudzewicz contests his judgment for lack of personal jurisdiction as well as on substantive grounds. He further appeals the ruling on the counterclaim. Because we conclude that the trial court lacked personal jurisdiction over Rudzewicz, we do not reach the merits.

I.

[1] In a diversity case, a federal district court must exercise its jurisdiction in accordance with due process and the law of the state in which the court sits. *Bankhead Enterprises, Inc. v. Norfolk & Western Ry.*, 642 F.2d 802, 804 (5th Cir. Unit B 1981). Although Rudzewicz concedes that his activities fall within the reach of the Florida

6. Mich.Comp.Laws Ann. § 445.1501 *et seq.*

long-arm statute, Fla.Stat. § 48.193(1)(g),[7] he argues that invocation of that statute under these circumstances exceeds the bounds of due process.

[2, 3] No defendant can be compelled to answer in a state's courts unless minimum contacts exist among defendant, the forum state and the litigation such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 203, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In deference to the sovereignty of the forum's sister states, due process requires "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94, 297, 100 S.Ct. 559, 565-66, 567, 62 L.Ed.2d 490 (1980); *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 159-60.

This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami. This is a subtle and difficult problem. As Mr. Justice White has

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7. That section reads:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

. . .

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

noted, "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff," a question which applies *a fortiori* to individual defendants, "has deeply divided the federal and state courts." *Lakeside Bridge & Steel Co. v. Mountain State Construuction Co.*, 445 U.S. 907, 909, 100 S.Ct. 1087, 1089, 63 L.Ed.2d 325 (1980) (White, Jr., joined by Powell, J., dissenting from denial of certiorari); *see also Baxter v. Mouzavires*, 455 U.S. 1006, 102 S.Ct. 1643, 71 L.Ed.2d 875 (1982) (White, J., joined by Powell, J., dissenting from denial of certiorari); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994, 102 S.Ct. 1623, 71 L.Ed.2d 856 (1982) (White, J., joined by Burger, C.J. and Powell, J., dissenting from denial of certiorari). *Cf. Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 601-02 & n. 9 (7th Cir. 1979). Mindful of this confusion and the continuing uncertainty as to the meaning of *Hanson v. Denckla* and its progeny, we focus our analysis on the guidelines set forth in Supreme Court precedent and the case law of this circuit.

II.

[4, 5] Due process restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. at 251, 78 S.Ct. at 1238. Hence, the minimum contacts measure is not a question of "a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to" the laws of the forum state. *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 160. A state cannot justifiably assert jurisdiction over an individual with whom it has

no constitutionally cognizable contacts or ties. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. at 565-66.

The *Hanson* requirement of purposeful activity within the forum state reflects two contrasting considerations. Particularly in the commercial context, fairness dictates that a defendant who derives profits from deliberate contacts within the forum state should be responsible for the costs such activities incur. On the other hand, due process abhors the unfair surprise that results when a party is haled into court in a state with which he lacks deliberate connections. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir.1974).

The interplay of these considerations—responsibility and preparedness—can plainly be seen in the leading Supreme Court cases of *Shaffer v. Heitner*, *World-Wide Volkswagen*, and *McGee v. International Life Insurance Co.* In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), plaintiff predicated Delaware jurisdiction in part on the fact that defendants had accepted directorships in Greyhound, Inc., a corporation chartered in Delaware but headquartered in Arizona. Reasoning that directorial appointment in and of itself did not notify defendants that they risked being sued in the state of formal incorporation, the Court concluded that they had not purposefully availed themselves of the opportunity to conduct activities in the state of Delaware so as to confer jurisdiction there. 433 U.S. at 216, 97 S.Ct. at 2586. Three years later, the Court further restricted the scope of personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Court denied jurisdiction over a suit arising from an automobile accident in the forum state of Oklahoma, reasoning that the local New Jersey car dealer

who sold plaintiff the car could not have expected that the sale might give rise to products liability litigation halfway across the country. 444 U.S. at 297-98, 100 S.Ct. at 567-68.

McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), reached the opposite outcome on the basis of slender contacts which nevertheless left the defendant prepared for the possibility of out-of-state litigation. In that case, the Texas successor to a defunct life insurance company wrote Franklin, a California resident, offering to reinsure the policy he held from its predecessor. Franklin accepted the offer and commenced mailing premiums from California to Texas. After Franklin died, the insurer refused to honor the policy. Franklin's beneficiary sued in California state court. Despite the scant contacts between the company and the forum state, the Court concluded that jurisdiction was properly asserted.[8] The defending insurer had derived profit from the California market by soliciting revenue from one of its residents. *Hanson*, 357 U.S. at 251-52, 78 S.Ct. at 1238-39. By virtue of its direct mail offer, furthermore, the insurer had reason to know that its business dealings brought it into contact with the

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8. In reaching its conclusion, the Court noted that California had an interest in affording redress to California residents when out-of-state insurers refused to honor their claims. The Court accorded that interest substantial weight because the prohibitive costs of distant litigation otherwise would force many claimants to forego worthwhile claims. 355 U.S. at 223, 78 S.Ct. at 201. Where a party claiming breach of contract can afford to sue outside of the forum state, as here, the state interest in redress is correspondingly weak. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 n. 27 (5th Cir.1974). *Cf. Lakeside Bridge & Steel Co.*, 597 F.2d at 602 n. 11 ("The forum state has a lesser interest in protecting a corporation in an interstate contract dispute, especially when the corporation left the state to solicit and secure the contract, because the effects of a commercial contract are unlikely to involve danger to persons or things within the state's border.")

forum state and it could adjust its premiums accordingly to reflect the added financial risk of litigation. *See World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

In contrast with their typical case in reconciling jurisdiction over non-resident sellers, courts have encountered particular difficulties in applying *Hanson's* requirement of purposeful activity to suits against non-resident buyers. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir.1972). In part this reflects a judgment that the activity of incurring a debt with an in-state seller, however purposeful, is not an activity which occurs in the seller's state. *See Lakeside Bridge & Steel Co.*, 597 F.2d at 601-04. The geographical location of activities such as debt incurrence cannot provide a workable basis for determining whether jurisdiction is fair in any given circumstance. A rule which would require determining the geographical origin of a given debt would in our mind unwisely revive the effort to pinpoint the situs of intangibles which in rem jurisdiction entailed. The often metaphysical character of this inquiry in the context of in rem jurisdiction justifiably led the Supreme Court to abandon it in favor of the functional test of fairness enunciated in *International Shoe*. *See Shaffer v. Heitner*, 433 U.S. at 212, 97 S.Ct. at 2584.

We recognize, of course, that there are many circumstances in which a buyer fairly can be held to account in a foreign jurisdiction for the debts he has incurred. While the stereotypical image of buyers as the passive recipients of sellers' attentions assumes that buyers lack notice of the seller's residence and financial resources to defend suit there, *In-Flight Devices Corp.*, 466 F.2d at 233; Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U.Ill.L.F. 574, 576, this assumption is not always true. Some buyers can

demand terms; others must accede to them. Thoughts of profit motivate some orders; more personal desires impel others. Purchases may involve large amounts or small, a single transaction or many. The buyer may be a local business or an interstate concern, ordering directly from the seller's headquarters or solely through the local hometown agent.

This array of considerations complicates efforts to adjudicate such jurisdictional challenges in a reasoned and coherent manner. We believe, however, that the crux of the distinction between passive and active buyers stems from a concern for unfair surprise, both in terms of reasonable notice and financial preparedness. Mail-order customers, for example, probably would not expect to be subject to suit in a foreign jurisdiction and often would not find it financially worthwhile to defend an action there. We therefore agree with other jurists and commentators who have noted the unfairness of asserting jurisdiction over out-of-state customers to collect payments due on modest personal purchases. *Baxter v. Mouzavires*, 455 U.S. at 1006, 102 S.Ct. at 1643; *In-Flight Devices Corp.*, 466 F.2d at 232; Currie, *supra*, at 574-77. *Cf. Rush v. Savchuk*, 444 U.S. 320, 329, 100 S.Ct. 571, 577-78, 62 L.Ed.2d 516 (1980) (insured not expected to defend suit in every state where insurer does business). A contrary result would sanction suit against mail-order customers in the home office's state even though they had never set foot there and even though the price they paid could not be lowered to reflect the risk of suit. Consumers would inevitably suffer a spate of default judgments if defense of small claims required a cross-country trek whose costs exceeded the expense of judgment itself. *McGee*, 355 U.S. at 223, 78 S.Ct. at 201. Counsel for Burger King agrees that such an outcome would be fundamentally unfair.

Our concern for adequate notice and fairness to buyers does not of course necessitate a broad rule immunizing purchasers generally from suit in the seller's home state. Where commercial parties of comparable bargaining strength contract for performance of manufacturing or services within that state's bounds, we have consistently held that jurisdiction comports with due process, even if negotiations occur elsewhere. *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 644-45 (5th Cir.1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981); *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 382 (5th Cir.1980); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir.1980) (per curiam); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974). *But see Lakeside Bridge & Steel v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907, 100 S.Ct. 1087, 63 L.Ed.2d 325 (1980). In short, the principle of fairness which is the essence of due process must be the compass which guides our inquiry.

We recognize that this case, in aspects, resembles commercial transactions which properly give rise to jurisdiction. Rudzewicz and MacShara were two Michigan entrepreneurs eager for the profits a franchise could promise. They signed contracts calling for payments exceeding $1 million over the life of the venture. Despite the expense of the transaction and its commercial end, however, we are troubled by elements of surprise which, if sanctioned, could ultimately sow the seeds of default judgments against franchisees owing smaller debts.

[6] Nothing in the course of the negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of

protracted negotiations was with representatives of the Michigan office. Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony. There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he has never even visited the state.

The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a Burger King facility there, required no performance in the state of Florida. Under the contract, the local Michigan district office was responsible for providing all of the services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from that office alone. To Rudzewicz, the Michigan office was for all intents and purposes that embodiment of Buger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters.[9] *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S.Ct.Rev. 77, 89-90; Comment, *Constitu-*

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9. This case bears a resemblance to *Arthur, Ross & Peters v. Housing, Inc.*, 508 F.2d 562 (5th Cir.1975) (adopting the opinion of the district court). Defendant, a North Carolina realtor, persuaded plaintiff, a Texas partnership, to purchase land in North Carolina. A lawsuit later ensued in Texas federal court. We agreed that the trial court lacked jurisdiction since performance of the contract was to occur entirely outside Texas borders. *Id.* at 565. *See also Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334, 1336-37 (5th Cir.1971).

tional Limits on State Long Arm Jurisdiction, 49 U.Chi.L. Rev. 156, 167 n. 56 (1982).

Given that the office in Rudzewicz' home state conducted all of the negotiations and wholly supervised the contract, we believe that he had reason to assume that the state of the supervisory office would be the same state in which Burger King would file suit. Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state.[10] We believe that this is one of those cases where "there is something to the notion that a party who has gone into a foreign State to do business with one of its residents can be expected to go back to bring suit." Currie, *supra*, at 574.[11]

Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. The franchise relationship in particular is fraught with potential for financial surprise. The device of the franchise gives local retailers the access to national

10. Burger King asserts that actual notice was provided by contractual provisions establishing that Florida was the state of the contract and that its choice-of-law rules would govern. We doubt, however, that boilerplate declarations in a lengthy printed contract suffice to provide actual notice of suit. In addition, *Hanson v. Denckla* established that the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction. 357 U.S. at 254, 78 S.Ct. at 1240.

11. In reaching this conclusion, we find support in *Shaffer v. Heitner*. Defendants in both cases were sophisticated businessmen who had reason to understand that they were entering into a business relation with a corporation chartered in the forum state. Yet in each case it was reasonable to assume that all working contact with the corporation would emanate from another state—in *Shaffer*, from corporate headquarters in Arizona; in this case, from the district office in Birmingham, Michigan.

trademark recognition which enables them to compete with better-financed, more efficient chain stores. This national affiliation, however, does not alter the fact that the typical franchise store is a local concern serving at best a neighborhood or community. Neither the revenues of a local business nor the geographical range of its market prepares the average franchise owner for the cost of distant litigation. *Cf. In-Flight Devices Corp.*, 466 F.2d at 234 (a business that lacks substantial out-of-state sales may be financially unprepared to defend suit outside of its home base). In *World-Wide Volkswagen*, for example, the Court held a local car dealer immune from suit despite its participation in a nationwide servicing plan. The Court reached this conclusion because, in part the limited range of the retailer's market was unconducive to insuring against the cost of defending an out-of-state personal injury suit. 444 U.S. at 297-98, 100 S.Ct. at 567-68. The same consideration militates against jurisdiction in this case.

The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. In a franchise contract, "the franchisor normally occupies [the] dominant role . . ." Annot., 67 A.L.R.3d 1299, 1302 (1975). *See, e.g., Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598, 67 A.L.R.3d 1291 (1973), *cert. denied*, 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed. 2d 475 (1974). In recent years, certain states, including Michigan, have moved to enact statutes to police the more flagrant excesses of franchises. Annot., 67 A.L.R.3d at 1301.

We discern a characteristic disparity of bargaining power in the facts of this case. There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit

in Florida.[12] He signed a standard form contract whose terms were non-negotiable and which appeared in some respects to vary from the more favorable terms agreed to in earlier discussions. In fact, the final contract required a minimum monthly rent computed on a base far in excess of that discussed in oral negotiations. Burger King resisted price concessions, only to sue Rudzewicz far from home.[13] In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.[14]

In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida.

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12. *See supra* note 4. Following protests on Rudzewicz' part, Burger King reduced the monthly minimum rent for the third year of the contract from $5,286.58 to $4,416.66. The reduction represented savings of $10,439.04. While sizable, this amount pales against the $641,900 disparity between the total rent Rudzewicz expected to pay and the amount Burger King charged.

13. We note that several Burger King franchisees have challenged personal jurisdiction in Florida courts without success. *See Burger King Corp. v. Elliott*, No. 80-2694-CIV-EBD (S.D.Fla. Jan. 9, 1981); *Burger King Corp. v. Wagner*, No. 80-942-CIV-EBD (S.D.Fla. July 16, 1980); *Burger King Corp. v. Robinson*, No. 79-5824-CIV-EPS (S.D.Fla. May 30, 1980); *Burger King Corp. v. Snow*, No. 80-295-CIV-SMA (S.D.Fla. March 18, 1980); *Burger King Corp. v. Levine*, No. 80-5852(08) (Cir.Ct.Fla. July 21, 1980).

14. Burger King urges us to impute MacShara's matriculation at Burger King University to Rudzewicz for purposes of minimum contacts. The company reasons that the ties of one partner can be attributed to all partners for suits arising out of their common ventures. We need not decide that question here, however, since Rudzewicz and MacShara never formed a partnership. They signed the agreements in their individual capacities. We conclude that contacts cannot be attributed from one individual defendant to another because "[t]he requirements of *International Shoe* . . . must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980) (emphasis added).

Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. We therefore reverse the judgment and remand with directions to vacate the judgment and dismiss the case.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the decision of the majority that appellant did not have sufficient minimum contacts with the state of Florida to support the exercise of personal jurisdiction by a federal district court sitting in diversity. To decide whether the exercise of jurisdiction comports with the requirements of due process, this Court must determine whether the defendant "has purposefully availed himself of the benefits and protection of the forum state's laws, whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state." *Austin v. North American Forest Products*, 656 F.2d 1076, 1089 (5th Cir.1981) (citing *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974)).[1]

This Court has recognized that the purposeful availment prong of the *Product Promotions* test may be satisfied even if the defendant performs no physical acts within the forum state, as long as his contacts with the forum were "'deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise'." *Austin, supra*, at 1089-90 (quoting *Prod-*

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1. The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its Governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

uct Promotions, supra, at 496) (footnotes omitted). In *Marathon Metallic Building Co. v. Mountain Empire Construction Co.,* 653 F.2d 921 (5th Cir.1981) (per curiam), the Court determined that the purposeful availment prong was satisfied when the defendant entered a contract that specifically provided that it would be governed by the laws of the forum state. *Id.* at 923. In this case, both the franchise agreement and the lease signed by appellant and Burger King specifically provided that the laws of Florida would govern their interpretation. Thus, appellant has purposefully availed himself of the benefits and protections of Florida's laws.

The forum state has a special interest in exercising jurisdiction when the contract in dispute calls for the application of the forum state's laws. *See Marathon, supra,* at 923 (forum has interest when contract requires application of forum's laws); *Product Promotions, supra,* at 498 (forum has interest when its laws will be "of some relevance in resolving the suit"). Thus, Florida here has a special interest in exercising jurisdiction over appellant.

Finally, no great imbalance of convenience here argues for one forum over the other. Appellant cannot successfully argue that, because a large corporation sues him as an individual, the inconvenience to him can defeat personal jurisdiction. *See Marathon, supra,* at 923

Ignoring this binding precedent, the majority opinion questions whether appellant had reasonable notice of the possibility that he would be haled into court in Florida and whether he was adequately prepared for that contingency, and it warns that a determination that jurisdiction exists in this case may mean that consumers, nonresident purchasers whom the majority likens to appellant, also will be subjected to the jurisdiction of foreign

courts simply because they have purchased goods under contracts requiring them to remit payment to the foreign state. In raising this specter, the majority does not give proper weight to the recognized fact that appellant was a senior partner in a Michigan accounting firm, who for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements, and who obligated himself personally to contracts requiring over time payments that exceeded $1 million. Appellant, who clearly does not resemble the average consumer, signed contracts that explicitly provided that Florida law would govern their interpretation. He therefore had reasonable notice of the possibility that he would be sued under the contracts in the state of Florida, and he should have been adequately prepared for that contingency.

(Filed March 22, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5424

BURGER KING CORPORATION,
a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MacSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 13, 11 Cir., 1984, ... F.2d .....).

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor it of (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5424
D.C. Docket No. 81-1145-CIV-K

BURGER KING CORPORATION, a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MacSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court with directions to vacate the judgment and dismiss the case in accordance with the opinion of this Court;

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 13, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/ (Illegible) Deputy Clerk

ISSUED AS MANDATE: May 7, 1984